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In the Supreme Court of the United States

OCTOBER TERM, 1924

MAPLE FLOORING MANUFACTURERS Association et al. v. UNITED STATES OF AMERICA	}	No. 342
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REPLY BRIEF ON BEHALF OF THE UNITED STATES

STATEMENT OF CASE

(Italics in quotations are ours, if not otherwise stated)

This is an action brought by the United States against the Maple Flooring Manufacturers Association and its several members to enjoin an alleged violation of the Sherman Antitrust Act. The original bill was filed on March 5, 1923, and it alleges in substance that the defendants, who manufacture a very large per cent of the maple, beech, and birch flooring marketed in the United States, fix minimum prices upon such commodity, and control its production and prices in the market by the observance of provisions contained in the plan of the association, which provide for the computation and distribution among the membership of alleged average costs, being in fact agreed minimum prices, for the

adoption and distribution of freight rate books, for an open price reporting plan, and for meetings of the members of the association. (Vol. I, pp. 1-12.) For the reasons fully set forth in its opinion, a decree was entered by the District Court in favor of the Government (Vol. 1, pp. 52-60), wherein it was adjudged that the articles of association and activities thereunder were violative of the said Antitrust Act; and it was ordered that the association be dissolved, and that the defendants and their agents be enjoined from further engaging in the practices specifically described in the bill and also in the decree (Vol. I, pp. 60-61). Defendants assigned errors, and prosecuted an appeal to this court.

BRIEF AND ARGUMENT

The record is a voluminous one and contains a vast amount of evidence that is believed to be immaterial; and only such points will be discussed and evidence cited as will be sufficient to clearly show the principles and proof upon which the decree of the court below was rested.

I

Percentage of the commodity produced and controlled by the defendants

With but three exceptions the plants of the defendant corporations are located in the States of Michigan and Wisconsin; and the evidence shows that the maple flooring industry is centered in those two states. Some time before the hearing the defendants took the

deposition of Edward B. Gordon, who is on the Research Staff of the Bureau of Business Research of Harvard University; and Mr. Gordon testified that he had searched through the several governmental bureaus at Washington for statistics showing who were engaged in the production of maple flooring, but was unable to obtain any information upon the subject. However, he was finally referred by the Chamber of Commerce of the United States to Hendricks' Commercial Register; and from that he took a list of those engaged in the manufacture of maple, beech, and birch flooring whose names did not appear in a list prepared by Mr. Keehn, the secretary of the association; and the two lists, one prepared by Mr. Keehn and the other by Mr. Gordon, which together purport to show the nonmembers of the association engaged in the business, were filed as Exhibits 1 and 2 to Mr. Gordon's deposition. (Vol. II, pp. 626-7.) To secure accurate data as to the production of such flooring in Michigan and Wisconsin the Government subpoenaed representatives of the several manufacturers appearing upon these lists whose factories are located in those states. And there appears in the record, either by way of evidence given by such representatives or by stipulation, the quantity of flooring produced for the years 1918-1922, inclusive, by such manufacturers. See Vol. I, pp. 83-88, 91-94, 96-98, 119-120, 137, and 140-142. From the data thus obtained and that contained in the barometers issued by the association, which show the amount of lumber produced by the members of

the association, and information obtained from other manufacturers appearing in the lists filed by Mr. Gordon in response to questionnaires sent out by the Department of Justice, Mr. Hughes, an agent for the Government, computed the amount produced by members of the association and by nonmembers respectively, and the percentage produced by the members, and filed as Government Exhibit 68 a statement showing the result of his calculation. (Vol. II, pp. 798-802.) His calculations appear in Vol. IV, p. 518, side pp. 3553-3708, a number of side pages not being printed. Without going into details, it appears from these estimates that the percentage of production of maple, beech, and birch flooring in the United States by members of the association for the years mentioned is as follows: 1918, 78.1%; 1919, 78.9%; 1920, 75.2%; 1921, 71.0%; and 1922, 70.0%. Average for the five years, 74.2%. (Side p. 3556.)

In Michigan the production of members was: 1918, 96%; 1919, 94%; 1920, 92%; 1921, 92%; and 1922, 92%. Average, 93%. (Side p. 3553.)

In Wisconsin the percents produced by the members were: 1918, 47%; 1919, 70%; 1920, 42%; 1921, 31%; and 1922, 49%. Average, 50.8%. (Side p. 3554.)

The production in Michigan is so much greater than that in Wisconsin that the percentages of production by the members in the two states were: 1918, 91.6%; 1919, 89.3%; 1920, 85.6%; 1921, 82.7%; and 1922, 82.8%. Average, 85.8%. (Side p. 3555.)

Mr. Hughes' estimates show the quantities produced in each of the several states. The defendants filed as Exhibit CC a list which also shows the production by nonmembers by states. (Vol. IV, pp. 831-833.) A comparison of the estimates will show no great difference, the defendants' tables more generally showing less production by nonmembers than the estimates made by Mr. Hughes.

In the petition filed by the association in 1915 with the Federal Trade Commission it was said that the members of the association "represent about seventy per cent of the industry." (Vol. III, p. 76.)

A petition to the President of the United States with reference to the Canadian duty on flooring, which was incorporated in the Minutes of the Meeting held March 22, 1923, stated that the members of the Association produce about seventy per cent of all Maple, Beech, and Birch flooring manufactured in the United States (Vol. IV, p. 507), and the answer to a questionnaire sent out by the Department of Commerce, which was incorporated in the Minutes of the General Meeting held April 20, 1922, stated that *the members of the Association represent about 70% of the productive capacity of the industry.* (Vol. III, p. 166.)

These figures are conclusive evidence that the industry is wholly dominated by the association.

II

Plan under which the association was operating when bill was filed

The articles of association under which the defendants were operating when this action was begun purport to run from January 1, 1922, to January 1, 1925, and are filed as Government Exhibit 8. (Vol. III, pp. 64-74.) The parts of this plan which appear material are as follows:

It declared, among other things, that its object was "to exchange information concerning the character and nature of actually completed and closed business transactions of its members; to collect and disseminate statistics concerning the flooring industry"; but it was declared that the association should not, either directly or indirectly, fix, regulate, or control the price, output, purchase, or sale of flooring, or attempt to do so. (Vol. III, p. 64.) The officers are a president, a vice president, a treasurer, a secretary, and a board of trustees, which board consists of the president, vice president, and treasurer, and four members elected by the association. (Vol. III, p. 65.) The board of trustees is vested with practically all of the governing powers (p. 66). It is provided that an annual meeting for the election of officers shall be held on the third Wednesday in January of each year, and that regular meetings shall be held on the third Wednesday of April, July, and October, and that special meetings may be called by the president or by a majority of the board of trustees, and that a meeting of the board of trustees may be held at any

time called by the president or by a majority of the board (p. 67).

Article XIV, which relates to cost of production, reads as follows:

SECTION 1. The sound business principle advocated by the Federal Trade Commission that manufacturers should carefully consider the question of cost in manufacturing and selling their product is recognized by the Association as the only scientific method of conducting the business of manufacturing and marketing Maple, Beech, and Birch flooring.

SECTION 2. For the purpose of furnishing to its members information regarding the average cost of manufacturing and marketing Maple, Beech, and Birch flooring, Surveys of Costs to ascertain such average cost shall be made from time to time by the Association, and such Surveys of Costs shall be filed with the Federal Trade Commission at Washington, D. C.

SECTION 3. In the judgment of the Association the following fundamental elements enter into and determine the average cost of Maple, Beech, and Birch flooring to the manufacturers when manufactured, sold, and delivered F. O. B. cars at the flooring plant:

(a) The actual market value of the raw material, as established from time to time by current sales of rough flooring lumber on the open market;

(b) The average cost and expense of manufacturing, selling, and delivering flooring F. O. B. cars at the flooring plant;

(c) Interest on the capital actually invested in the flooring business at the rate of six per cent per annum;

(d) Annual depreciation of plant as is usually allowed by the United States Government;

(e) The usual overhead charges in carrying on the flooring business; and

(f) A reasonable allowance to provide for contingencies and unforeseen hazards incident to manufacturing operations. This allowance is estimated at five per cent of the average total cost of Maple, Beech, and Birch flooring when delivered F. O. B. cars at the flooring plant. (Vol. III, p. 69.)

With reference to statistical reports, it is provided in Article XV as follows:

SECTION 1. In order that the relations of supply and demand and the statistical conditions existing from time to time in the Maple flooring industry may be known, the following statistical monthly reports shall be made to the Secretary by each member of the Association on or before the 5th day of each month:

(a) Report of Stocks on Hand of Maple, Beech, and Birch Flooring at the end of the previous month.

(b) Report of Unfilled Orders on Hand for Maple, Beech, and Birch Flooring at the end of the previous month.

(c) Report of the amount in feet of Shipments made during the previous month of all kinds of Maple, Beech, and Birch flooring for

use within the United States, except Maple, Beech, and Birch Flooring purchased from other members of this Association.

(d) Report of Production of Maple, Beech, and Birch Flooring during the previous month.

(e) Report of New Orders Booked for Maple, Beech, and Birch Flooring during the previous month.

(f) Report of Average Prices Realized F. O. B. flooring plant after deducting freight, for $1\frac{3}{8}$ " x $2\frac{1}{4}$ " face Clear, No. 1 and Factory Maple Flooring, standard grades and lengths, sold during the previous month.

SECTION 2. *In addition to the foregoing monthly reports, each member of the Association shall send to the Secretary promptly at the end of each week a report of all sales made during that week of Maple, Beech, and Birch Flooring. These weekly sales reports shall state the quantity, kind and grade of flooring sold, the delivered price sold at, the average freight rate to destination of shipment, and the commissions paid, if any. (Vol. III, p. 70.)*

The Association adopted a trade-mark for the use of its members, and the articles set forth a trade-mark agreement whereby the member is permitted to use the trade-mark as long as he retains his membership, but such right shall cease immediately upon his ceasing to be a member. Every member is given a number which appears on the trade-mark for identification. Each member agrees that he will maintain the standard grades which the association may from time to time establish, that an inspector shall have

the right to visit the plant to see that the grades are properly maintained and to protect the association against damage shall the member fail to maintain the standard fixed; and a license fee of fifty dollars is paid for the use of the right to use the trade-mark. (Vol. III, pp. 72-73.) The members are required to pay to the association the following amounts:

1. All new members admitted after May 1, 1922, are required to pay for the benefits which "they will enjoy from the Association trade-mark" the additional sum of \$100 for each matcher installed for the manufacturing of flooring, which is a part of the Advertising Fund. (Vol. III, p. 65.)

2. Each member pays a fee of \$200 for each matcher, which constitutes a fund called "The membership fee fund." (Vol. III, p. 68.)

3. Each member pays 25c per M feet on all flooring shipped, except flooring purchased from other members, which goes into the "Expense Fund" to provide for the current running expenses of the association. (Vol. III, p. 71.)

4. Each member pays 10c per M feet on all flooring shipped, except flooring purchased from other members, which goes into the "Advertising Fund" (p. 71).

5. An annual fee is paid by each member of \$50 as a license for use of trade-mark which also becomes a part of the "Advertising Fund" (p. 73).

These articles of association were actually adopted some time in March, 1922, but were dated back to

January 1, but the former association functioned up to the time of their adoption. (Keehn, Vol. I, pp. 78-79.)

III

Previous articles of association under which manufacturers of maple and beech flooring operated

So far as the record shows the first association was organized in 1905, with headquarters in Chicago. The members of that and subsequent associations manufactured maple, beech, and birch flooring, and some of them also manufactured oak flooring. The association of 1905 continued until 1907 or 1908, when it was succeeded by another association, the articles of which expired about 1909. That association was succeeded by another which lasted until either 1911 or the fall of 1912, when a successor was organized. The articles of that association bear date as of January 1, 1913, and are filed as Government Exhibit 1, being the first articles of association introduced. (Keehn, Vol. I, p. 72.)

There are twenty-two manufacturing companies who are made defendants, and they constitute the membership of the present association. Of these twenty-two members sixteen were members of the association which began to function January 1, 1913. There were thirty members of that association. (Keehn, Vol. I, p. 73.) Among other objects mentioned in those articles were "to exchange information; to collect and disseminate statistics concerning the flooring industry." The officers and their duties,

and the meetings specified, were substantially the same as those provided for in the present articles of association.

A special fund was created by those articles, which was deposited as a guaranty that the member would carry out all of its obligations and if it failed to do so its share of the special fund was forfeited. (Vol. III, p. 5.) There was also created a general fund; and for the purpose of securing moneys for that fund an assessment of \$3 per M feet was levied each month on "all shipments during that month in excess of the allotted percentage set opposite the signature of each member"; and it was provided that from such fund each member who had shipped during the month less than its allotted percentage should be paid \$3 per M feet on the quantity undershipped down to 75% of its allotment, and if a member shipped less than 75% of its allotment during any one month, it should receive \$3 per M on the deficit down to 75% of its allotment, and that the balance should be held until the end of the year; and if at the end of the year it had shipped 75% of its allotment for the year it would be paid the balance, but if it had failed to ship as much as 75% of the allotment the amount retained would belong to the Association. (Vol. III, p. 6.) -

It was provided that each assessment for that fund should be paid within five days after the assessment had been made and notice given, and if any member failed to pay his assessment within thirty days the trustee should draw upon the member's share of the

Special Fund, and if the amount was not restored to the Special Fund by the member within ten days after notice he should cease to be a member of the Association, and should forfeit all interest in both the special and general fund. (Vol. III, p. 6.) It was further provided that daily reports should be made by each member of the association to the secretary at the close of business of all deliveries and shipments of all kinds of maple, beech, and birch flooring for use within the United States, except that purchased from other members; and it was specified what such reports should include. (Vol. III, p. 7.)

These articles of association were continued with a few modifications for three additional years until January 1, 1919. (Keehn, Vol. I, pp. 74-75.) The articles in effect during that period are filed as Government Exhibit 2 (Vol. III, pp. 14-21). Of the twenty-two members of the present association seventeen were members during the existence of those articles of association, the membership then being twenty-eight. (Keehn, Vol. I, p. 75.) Those articles were succeeded by another set, which went into effect on January 1, 1919, and continued for six months, or until July 1, 1919. Those articles are filed as Government Exhibit 3. (Vol. III, pp. 25-32.) They contain precisely the same provisions as to allotment and statistical reports as those contained in the preceding articles (Vol. III, pp. 30-31), but a different method was provided for raising the special fund (Vol. III, p. 29). Twenty-one members of the present association were members of that

association, which consisted of twenty-nine members. (Keehn, Vol. I, p. 76.) Other articles of association were adopted and went into effect July 1, 1919, to be effective until July 1, 1922 (Vol. III, pp. 37-44); but Mr. Keehn testifies that the allotment feature was discontinued on March 31, 1920, and that there has been no general fund or allotment payments since that date. But, strange to say, there was no minute made by the association or by the board of trustees showing such fact. On being questioned by the court, the witness claimed that they took this action on advice of counsel, but admitted that he thought there was nothing in the minutes to show such fact. (Vol. I, pp. 76-78.) Instead of the articles adopted July 1, 1919, being continued to July 1, 1922, as was contemplated, as above stated the articles now in effect were adopted in March, 1922, but were dated back as effective January 1, 1922. In the meantime, however, a draft of articles was made, and was signed by a large number of the manufacturers, which purported to extend over the period from October 1, 1921, to July 1, 1922 (Gov. Ex. 5, Vol. III, pp. 49-56); but Keehn says that they did not go into effect because not signed by three or four of the manufacturers (Vol. I, pp. 78-90). Although Keehn says that the allotment feature was discontinued March 31, 1920, *yet it will be noted that in this tentative draft that feature was retained*, but instead of collecting three dollars per thousand on excess production, and paying the same amount on over-production, the amount to be collected and paid was four dollars per thou-

sand. (Vol. III, pp. 54-55.) If all but three or four of the members were willing to sign articles containing such an agreement to extend from October 1, 1921, to July 1, 1922, it can hardly be believed that the allotment feature ceased on March 1, 1920, especially in view of the fact that no record of any such action was made.

The fact of the matter appears to be that for some reason not disclosed by the record, the operation of the allotment articles was *suspended* for a period of 18 months from March 31, 1920, until October 1, 1921, so far as the collection and distribution of the General Fund was concerned. This is established by a number of letters in the record. A letter dated Nov. 22, 1920, from William Horner to Mr. Keehn stated:

We note by your report of the General Meeting that you do not mention the resolution regarding the allotment plan at all. Please advise us by early mail, if you intend to put the allotment plan into force immediately or if this is to be held in abeyance for the present. (Vol. IV, p. 560.)

Mr. Keehn's answer dated November 29, 1920, said:

The question of resuming the allotment payments, which have been held in abeyance since March 31st, will be taken up by correspondence with the Trustees and the entire membership in time so that some definite action can be taken at the next general meeting to be held on December 22d. (Vol. IV, p. 560.)

But another letter from Mr. Keehn to William Horner dated December 31, 1920, shows that the meeting on the 22d was a "mixed-up mess", and that nothing was accomplished. (Vol. IV, pp. 560-561.) Apparently nothing more was done about the matter until the proposed Articles of Association dated October 1, 1921 were under consideration, when under date of September 1, 1921, Mr. Keehn sent to each member a copy of the proposed revised articles, stated the changes incorporated in them, and in explanation of the allotment articles stated:

It would seem that the allotments as agreed upon in our present Articles of Association, which allotments were to be in force from July 1, 1919 to July 1, 1922, should govern from October 1, 1921 to July 1, 1922, because each member has already agreed to his allotment to run to July 1, 1922, and if we begin changing allotments, there will be no end to it. Inasmuch as the allotments were suspended from April 1, 1920 to October 1, 1921, a period of 18 months or one-half of the three-year period originally agreed upon, there should be no particular hardship on any member to reinstate his allotment from October 1, 1921 to July 1, 1922, being the nine months remaining of the three years originally agreed upon. (Vol. III, p. 61.)

The proposed Articles of Association of October 1, 1921, apparently did not actually go into effect because of the refusal of the Nicholas & Cox Lumber Company and of the Holt Hardwood Company to

join with the other members who had expressed themselves in favor of reinstating the allotment feature, unless their allotted ratios in M feet were readjusted to be in harmony with the volume of their production and shipments during a more recent period than the one used in basing their allotted percentages, (Vol. III, p. 63.) In one respect, however, the allotment feature of the July 1, 1919, Articles of Association was actively in force and enforced until the present Articles of Association were adopted, as the first-named articles provided by Article XVI that:

An Expense Fund to provide for the current running expenses of the Association shall be established and maintained by the payment, as often as required by the Board of Trustees, of assessments levied upon the members of the Association of Twenty-Five (\$25.00) Dollars per each one (1%) per cent. allotted to each member under these Articles of Association. (Vol. III, p. 31.)

The Special Fund or Guarantee Fund by Article XIII of the 1919 Articles was also based on the allotted established percentages, and no change was made in the Special Fund or in the method of providing for the current running expenses of the Association, except in the case of one new member, until the 1922 Articles were adopted (Vol. IV, pp. 481-482.)

The provisions relating to determining average cost appeared for the first time in the proposed Articles of October 1, 1921, in practically the same

form as in the Articles under which the Association is now operating, except that the principles stated were recognized *and adopted* as the only scientific method of conducting the business of manufacturing and marketing Maple, Beech and Birch flooring. (Vol. III, pp. 53-54.)

There was an effort on the part of the witness Keehn, who is secretary of the defendant association, to make it appear that an entirely different association operated under each one of the plans above described; but he was forced to admit that he was the secretary of all the associations; that each one functioned until the articles of its successor were adopted; and he did not deny that the office was continued at the same place; and, as above shown, nearly all the members of the present association were members of each one of its predecessors. (Keehn, Vol. I, pp. 73-76.) The continuity of these associations is also undisputably shown in Keehn's cross-examination. (Vol. I, p. 143.)

IV

Minimum price plan and minimum price basis

In addition to the articles of association above described, on August 27, 1915 (Gov. Ex. 10, Vol. III, pp. 76-78), a petition dated July 14, 1915, was filed with the Federal Trade Commission, and on June 27, 1916, an agreement between the petitioners designated as a "Minimum Price Plan," to which a copy of the petition was attached, was also filed with the Commission. (Vol. III, pp. 78-81 and Vol. IV, p.

798). The signatures of twenty-eight manufacturers were attached to the petition, and the signatures of twenty-three were attached to the plan. Fourteen of the defendants signed both the petition and the plan. The plan provided for an amendment to the articles of association, to be operative from July 1, 1916, to November 1, 1917, and Article I of the proposed amendment provided that:

Pursuant to the petition dated July 14, 1915, which the Maple Flooring Manufacturers' Association submitted to the Federal Trade Commission at Washington, D. C., on or about the 27th day of August, 1915 (a copy of which petition follows this supplemental agreement), the members of the Maple Flooring Manufacturers' Association *hereby agree to establish minimum prices for the sale of Maple, Beech, and Birch Flooring, and agree not to sell any Maple, Beech, or Birch Flooring during the period beginning July 1, 1916, and ending November 1, 1917, below such minimum prices.* (Vol. III, p. 78.)

Article II provided that in order that the minimum prices might be fair and reasonable, the actual average cost of flooring should be determined by the following elements, to wit:

- (a) The actual market value of the raw material;
- (b) The average cost and expense of manufacturing and selling flooring;
- (c) Interest on the capital actually invested in the flooring business at the rate of five (5) per centum per annum;

- (d) Annual depreciation of Plant; and
- (e) The usual overhead charges incurred in carrying on the flooring business. (Vol. III, pp. 78-79.)

Article III provided that minimum prices should from time to time be established under the agreement, but that they should not exceed an amount which would give the member an average net profit over the average actual cost to be determined, in excess of ten per cent.

By Article IV a scale of minimum prices to be observed until altered was established.

By Article V the members were prohibited from selling during the period mentioned flooring at less than the minimum prices established, or to be established, and it was provided that if any member should sell for less than the minimum price, it should pay to the association a sum equal to 10% of the amount received for the lumber so sold.

By Article VI each member was required upon the request of the secretary to furnish a report showing its sales and to whom, and the prices at which made; and the secretary was given the right to examine the records of the members.

Article VII provided that if a member had on hand flooring which it was unable to market at the minimum price, or to any other member of the association without regard to such price, it should offer the flooring to the members through the secretary; and in case it was bought by a member, it should not be resold by the purchaser at a price less than the

minimum; but if not bought by some member within thirty days, then the owner might sell the flooring in open market at any price, not less than the price at which he offered it to the members of the association; and that if a member should violate such provision he should pay the association a sum equal to 10% of the amount received for the lumber.

Article VIII provided that if a member did not pay the 10%, the secretary should cause the same to be paid from any funds standing to the credit of such member. The agreement was signed with the understanding that it should be signed by all the members, and that it should be filed with the Federal Trade Commission. (Vol. III, pp. 78-81.) The petition was attached to copies of different plans, and appears in the record [1] Vol. III, pp. 76-78; [2] pp. 82-84; [3] pp. 89-91; and [4] pp. 95-97.

As stated in the following paragraph from the report of the Market Conditions Committee (the functions of which committee are explained in detail hereinafter on p. 126) dated June 22, 1916, the Minimum Price Plan Agreement was finally signed by all the members, and became effective from July 1, 1916, until November 1, 1917:

Minimum price plan

The Special Committee is indeed happy to report that Mr. I. N. Bushong, of the Northwestern Cooperage & Lumber Company, attended the meeting and signed the Minimum Price Plan Agreement in behalf of his company.

The Minimum Price Plan Agreement is, therefore, consummated, and will take effect July 1st, 1916, as telegraphed yesterday. The duration of the agreement is from July 1, 1916, to November 1, 1917. As the time between now and July 1st is quite short, and as members may have quotations out which they may not hear from before July 1st, it is understood that any bona fide outstanding quotations may be protected up to July 10th. (Vol. IV, p. 430.)

Even at the time they first adopted and operated under the Minimum Price Plan, some of the defendants were rather uncertain as to its legality, or perhaps quite certain as to its illegality. Under date of September 1, 1916, the East Jordan Lumber Company advised Mr. Keehn that in the opinion of their attorneys the plan was in direct violation of the Federal Statutes and also of the Michigan Statutes (Vol. IV, pp. 545-546), but this difficulty was ingeniously answered by Mr. Keehn in his reply dated September 7, 1916, part of which reads as follows:

Replying to your letter of the 1st, the submission of the Minimum Price Plan to the Federal Trade Commission takes care of all legal questions pending the reply of the Commission, and if the Commission decides that the Plan is not legal, they will, no doubt, tell us to discontinue its operation.

When the Plan was under consideration, the Association requested its attorney, Mr. Newman, to handle the legal details, and it was understood that the members of the Association would leave it to him instead of each mem-

ber consulting his own attorney. If all the members submitted all Association questions to their attorneys we would have such a diversity of opinion that nothing could be accomplished, and for that reason it has been an advantage to the Association to have an able attorney like Mr. Newman to advise us.

Inasmuch as the Minimum Price Plan is an amendment to the Articles of Association, and is consequently now a part of that contract, all I can do, it seems to me, is to send a copy of your letter to the Board of Trustees. (Vol. IV, p. 546.)

Mr. Keehn's letter of September 7, 1916, also shows that the problem had been presented by the Wisconsin members of making the affidavit required by the laws of that State in answer to the question "whether such corporation has entered into any combination, conspiracy, trust, pool, agreement, or contract," etc., and although Mr. Keehn first stated in a letter dated January 17, 1917, that the affidavit could not be signed while a corporation was a party to the Minimum Price Plan, this difficulty was also solved, and under date of February 7, 1917, Mr. Keehn advised the Foster-Latimer Lumber Company that inasmuch as the Association had never received the approval of the Federal Trade Commission to the Minimum Price Plan, and as the matter was still pending, the Plan had never been consummated and had never been in effect. The Foster-Latimer Company nevertheless made its report to the State with the notation: "We are members of Maple Flooring Manufacturers

Association and all matters pertaining to that organization are submitted to Federal Trade Commission." (Vol. IV, pp. 546-548.)

The original Minimum Price Plan was extended from November 1, 1917, to January 1, 1919, to run concurrent with the duration of the allotment articles, by a resolution adopted at the meeting held July 20, 1917, in accordance with a recommendation of the Market Conditions Committed. (Vol. IV, pp. 436-437.)

In a letter to members dated October 14, 1918, Mr. Keehn stated that the allotment contract and Minimum Price Plan would both expire by limitation on December 31, and made the following suggestions as to the renewal of the Plan:

6. The M. P. P. to be rewritten to include all modifications adopted to date and its duration to run concurrent with the Allotment Articles.

It would be my thought not to incorporate the Allotment Articles and the M. P. P. in one document, but to have the M. P. P. supplemental to the Allotment Contract as at present, so in case the Federal Trade Commission should advise the cancellation of the M. P. P. it can be done without disturbing the Allotment Contract or vice versa. (Vol. IV, p. 444.)

The plan was accordingly revised as of January 1, 1919, to be in effect from January 1 to July 1 of that year; and it was recited that the revised plan was made pursuant to the petition filed with the Federal Trade Commission on July 14, 1915. (Vol.

III, p. 84.) This plan contained the same provisions as the former, with the addition that each member might register special representatives; who were required to be wholesalers or commissioned salesmen, and whose registration should be confidential, and that a concession of one dollar per thousand might be made to such representatives, and further, that a list of wholesalers and commission men should be adopted to whom a like concession might be made as soon as such list should have been published to all the members of the association, and that nominations for registration should be made in writing to the secretary by members of the association, and all nominations should be bulletined to the members by the secretary, and if no objections were filed within ten days the registration should automatically become valid. Thus a favored class of dealers was provided for. (Vol. III, pp. 88-89.)

The Minimum Price Plan was continued after July 1, 1919, and was finally vacated by the following resolution adopted at the Annual Meeting held February 12, 1920:

M. P. P. Vacated.—On motion, the following resolution was adopted by unanimous vote:

“Whereas the Minimum Price Plan was submitted to the Federal Trade Commission for its approval on June 27, 1916, and the Commission has taken no action with respect to the same, neither approving nor disapproving the Plan; and

"Whereas said Plan has never been enforced by the Association;

"*Therefore be it resolved*, That said Minimum Price Plan and all resolutions relating to the same, be and they are hereby vacated."
(Vol. IV, p. 529.)

This action was undoubtedly taken because recommendations or agreements as to *minimum* prices were a futility in February, 1920, as the annual report of the Secretary which was read at the meeting before the resolution quoted above was adopted, commented at length upon conditions in the industry, and then stated that the time was rapidly approaching, if it had not arrived, when concerted action should be taken by the Association to stabilize the price of flooring, and that *maximum* prices could be established from time to time. At the same meeting, however, the Association adopted the resolution instituting the weekly sales reports which is quoted hereinafter (p. 86) and also the following resolution:

New Table of Values.—On motion, the Secretary was instructed to compile for the information of the members a Table of Values showing what the selling prices of flooring should be if based scientifically upon actual average cost and if a profit is included of 10% reckoned upon selling prices F. O. B. the flooring mill.

It was the sense of the meeting that the following fundamental elements constitute the basis of cost in ascertaining what the selling prices of flooring should be:

- (a) The actual market value of the raw material.
 - (b) The average cost and expense of manufacturing and selling flooring.
 - (c) Interest on the capital actually invested in the flooring business at the rate of five (5) per centum per annum.
 - (d) Annual depreciation of Plant; and
 - (e) The usual overhead charges incurred in carrying on the flooring business.
- (Vol. IV, pp. 528-529.)

Conditions in the industry during the latter part of 1920 were not as favorable for the manufacturers as they had been in February, and under date of December 16, 1920, Mr. Thomas, the Chairman of the Market Conditions Committee, wrote to Mr. Keehn and stated:

From present indications I assume that there will be an insistent demand for the resumption of our M. P. P. at the time of our next meeting, December 22. It seems to me desirable to work out an adjustment of the plan so it can be put into effect the first of the year providing the members all agree to it. (Vol. III, p. 97.)

Then on January 6, 1921, a plan, known as the "Minimum Price Basis," was adopted, which was to be effective from that date to July 1, 1922. This purported also to be based upon the petition filed with the Federal Trade Commission on July 14, 1915; and it was stipulated that "the members of the Maple Flooring Manufacturers' Association hereby estab-

lish a Minimum Price Basis for the sale of maple, beech, and birch flooring." (Vol. III, p. 92.) The elements which entered into the computation of cost were the same as in the former stipulation, except the interest allowed was six per cent on capital invested instead of 5%, and the minimum price should not give a member an average net profit in excess of 5%, instead of 10% as specified in the former agreement. (Vol. III, pp. 92-93.) A table of values was agreed upon, subject to change; and it was stipulated how much commission might be allowed each member's special representatives and also the amount allowed those registered as wholesalers and commission men, and what the terms of sale should be. The only difference between this plan and the "minimum price plans" previously adopted was, that this one did not prescribe a penalty for violation, or provide a method to enforce its observance. It was recited that the plan should be filed with the Federal Trade Commission for its approval, and that *in the event of its disapproval* it should be void. Of course, the Commission expressed no opinion upon the subject, and by its very terms it became effective. This plan was signed by twenty-three manufacturers, of whom eighteen are defendants in this litigation. (Vol. III, pp. 92-94.)

It was first claimed by the witness Keehn that neither the Minimum Price Plan nor the Minimum Price Basis ever went into effect, and when shown the Plan revised as of January 1, 1919, and asked "Did that go into effect on that date?" he replied,

"No minimum price ever was enforced or was consummated. (Vol. I, p. 80.) Later, on cross-examination, he made a distinction between the plans being "in force" and "enforced" and stated:

Q. When you said in your direct examination that it was never enforced will you explain just what you mean by that? What was done by the association then existing under this minimum price plan, government exhibit 11, if anything?

A. Some of the statistical data and lists of surplus stock, etc., were submitted to the association, but no penalties or fines or assessments of any kind were ever made upon or claimed for or ever paid into the general fund or the treasury of the association or were demanded by the association. In other words, the members continued on and so far as my judgment and opinion goes they sold their flooring at whatever prices they pleased. (Vol. 1, p. 144.)

His attention was called to a recital in the minutes of a meeting held January 6, 1921, as follows:

The committee then made its report and the plan as formulated, to be known as the minimum price basis, was read and fully discussed by the meeting, *and on motion was accepted;*

and the witness drew a distinction between "accepted" and "adopted" (Vol. I, p. 148), as he had previously done between its being "in force" and "enforced" (p. 146).

That the Minimum Price Plan was "in force" and at least in a measure "enforced" ever since it was first devised is shown by many of the exhibits introduced by the Government. Exhibit 31 M (Vol. III, side p. 533) is a page dated July 1, 1916, entitled "Application of Minimum Prices," which was combined with the Table of Values of May 15, 1916, and which reads as follows:

The Delivered Prices in the Table of Values of May 15, 1916, in the Association Rate Book and Index of Towns, are the basis of the Minimum Prices—not F. O. B. mill prices.

Minimum Prices of $1\frac{1}{8}$ ", $1\frac{5}{8}$ ", and $1\frac{1}{2}$ " Maple, Beech, and Birch Flooring are based on the Rate Book Full List Delivered Prices of $1\frac{3}{8}$ " D. & M. Maple.

Minimum Prices of $1\frac{3}{8}$ " Jointed Flooring are based on the Rate Book Full List Delivered Prices of $1\frac{3}{8}$ " D. & M. Maple.

Prices of $2\frac{1}{2}$ " face D. & M. or Jointed are based on $2\frac{1}{4}$ " face D. & M.

Prices of 3" or wider faces D. & M. or Jointed are based on $3\frac{1}{4}$ " face D. & M.

A Minimum Price is the bottom price, not an average price.

Don't stay at the bottom.

When your stock conditions and sales opportunities will not warrant your holding for top prices, insist at least on getting a substantial advance over the Minimum Price.

That some at least of the members did not ignore their agreement to maintain the minimum prices (which were apparently also the actual current

selling prices) is shown by a letter from the Bigelow-Cooper Company to Mr. Keehn, which the latter circularized to all the members under date of September 14, 1916, and which reads in part as follows:

We received the following letter from our New England salesman, which we thought would interest you:

"I was very much surprised this morning in trying to secure an order from Blacker & Shepard Co. for a carload of 13/16 x 2 1/4" No. 1 Maple flooring, *that I was the only one quoting on new basis of prices . . .* I did not get the names of any of the concerns bidding, but it surprised me to think that not one of them was over \$41.00, whereas our quotation was \$42.50."

The writer does not know of six concerns quoting in Boston Territory who are outside of the Association. It would look as though all your good members are not sticking. *We are continuing, however, to ask the prices.* (Vol. IV, p. 431.)

Action taken by the Association to establish new minimum prices or new spreads in accordance with Articles II and IV of the Plan is shown by the January 26, 1917, Table of M. P. P. Values (Vol. III, p. 245); the minutes of the meeting held July 20, 1917 (Vol. IV, pp. 434-435); the letter to members dated May 23, 1918 (Vol. III, p. 299); the Market Conditions Committee Report dated June, 1919 (Vol. III, p. 246); and the Market Conditions Committee Report dated August 21, 1919 (Vol. III, p. 249). A report entitled

"Listings of M. P. P. Surplus Stocks" illustrates the method of operating under Article VII of the Plan. (Vol. III, pp. 256-260.) The June, 1919, Report illustrates in detail the method of determining and establishing minimum prices and is therefore quoted at length:

Current Net Values.—Current Net Values for June reflect the advance adopted in May, but as the advance adopted in June did not take effect until June 19th, with the customary ten days in which to protect outstanding quotations, it was not to be expected that a large volume of new orders would be booked in June at the new June prices. Current Net Values for July, however, will reflect the June 19th M. P. P. Basis.

Survey of Costs.—Surveys of Costs for the 2nd quarter of 1919 were received from ten members whose flooring operations are typical of the average of the industry. Their reports indicate an advance in Manufacturing and Marketing Costs of \$1.29 over the previous survey. The gross cost is \$22.14 less wood \$2.22, leaving the net cost \$19.92 compared with \$18.63, according to the preceding survey. The market value of rough flooring lumber has also advanced. The Committee felt that it should be conservative and that it would be better to be too low than too high regarding the average current market value of lower Michigan, upper Michigan and Wisconsin 4/4 Maple Flooring stock. Based upon information regarding recent sales, not asking prices, the Committee concluded that \$3.00 would represent the advance on the flooring lumber.

This would equal \$3.66 advance in the cost of 1,000 ft. of flooring (counting 18% waste) in arriving at the selling basis of the product. Using the composite results of the seven test runs, as per our revised statement of May 15, 1919, it works out as follows:

Cost of 1,000 ft. of flooring sold.....	\$56.34	
To cover \$3.00 advance on flooring lumber, counting 18% waste.		
Add.....	3.66	
Add increase in Manufacturing and Marketing Costs from \$18.63 to \$19.92.....	1.29	
		\$61.29
Add one-ninth to give 10% profit on sales....	6.81	
		\$68.10
Value of Seven Test Run flooring product per statement of May 15th.	\$58.98	
Add advance of June 19th.....	6.00	
		64.98
Horizontal advance required.....	3.12	
		68.10

Committee's Recommendations.—In view of cost conditions the Market Conditions Committee recommended a horizontal advance of \$3.00 and the recommendation was immediately telegraphed to all the other members of the Association as follows:

"Because of increased costs Market Conditions Committee recommends horizontal advance of Three (\$3.00) Dollars effective today. Please wire approval today."

At this writing we have received affirmative replies from all but one member of the Association, and we are expecting to hear from him during the day.

Some of the replies which we quote below favored a larger advance than \$3.00. (Vol. III, pp. 246-247.)

After quoting some of the replies favoring a large advance the Report continued:

So, if any members of the Association feel that the recommendation of the Committee is too low or is at a lower basis than they wish to take new orders at, they can, of course, pursue the same course and ask more than this new M. P. P. Basis.

It should always be remembered that the M. P. P. is a minimum price not a maximum price.

Values of $\frac{3}{8}$ ".—The Committee discussed the market value of $\frac{3}{8}$ flooring, which is also oversold to a greater extent than ever before in the records of the Association, especially the Clear grade. It was the view of the Committee that a horizontal advance of \$5.00 on $\frac{3}{8}$ " Clear and No. 1 be recommended, and the Secretary was instructed to have a new Table of Values covering the $\frac{3}{8}$ " printed and mailed to the members. Please bear in mind that the $\frac{3}{8}$ " prices do not carry any concession, but are net, being subject only to commissions to your Registered Special Representatives and to Registered Wholesalers and Commission Men. (Vol. III, p. 248.)

No report of individual sales were furnished to the members by the association during the life of the Minimum Price Plan, but while the Minimum Price Basis of January 6, 1921 was in force the regular weekly sales reports were being prepared and distributed. Exhibits 20, 20 A, 21 and 22 (Vol. III, pp. 261-76) are the reports dated January 13,

January 20, January 27 and February 3, 1921. Each report gives in successive columns from right to left the date of the sale, the quantity, the dimension, the grade and wood, the delivered price, the new index letters (freight rate symbols), the M. P. B. (the Minimum Price Basis delivered price), the commission, and the identification number of the mill, except that there are not in all cases M. P. B. prices to compare with the actual prices. A tabulation of all the comparisons given, however, shows the following results:

Report dated	Actual prices exactly equal to M. P. B. prices	Actual prices over M. P. B. prices	Actual prices under M. P. B. prices
January 13, 1921.....	14	20	5 (1 explained as per note 1).
January 20, 1921.....	31	22	8 (3 explained as per note 2).
January 27, 1921.....	21	10	11 (10 explained as per note 3).
February 3, 1921.....	50	20	11 (5 explained as per note 4).

(1) Quotation lowered to meet competition.

(2) One sale to association member, two sales on quotation made prior to Jan. 6, 1921.

(3) Nine sales to association members, one sale price reduced because of cancellation after car loaded.

(4) Three sales made to association members, two sales made with 50¢ error in freight rate.

Mr. Keehn stated with reference to the Minimum Price Basis:

The minimum price basis never provided for any penalty of any kind. A man could do just as he pleased about it. It was without force or effect. It was simply a statement of business policy. (Vol. I, p. 82.)

We did not exact any penalties of any kind under the Minimum Price Plan, but in the Minimum Price Basis no penalties of any kind were even prescribed. *It is simply a statement*

operation. I hope some new plan can be worked out that will improve conditions. Vol. IV, p. 563.)

The minutes of the special meeting held April 27, 1921, contain only the following brief reference to the "new plans" under consideration:

The statistical reports for the month of March, 1921, were submitted to the meeting and briefly discussed, and several plans to remedy the present deplorable conditions in the industry were suggested and considered, but no definite conclusions were arrived at.

It was suggested that the plans proposed be given further thought and that the meeting adjourn subject to the call of the President with the understanding that the President would call such meeting to be held at as early a date as possible. (Vol. III, p. 134.)

But in a letter to Mr. Earle, Mr. Thomas, and Mr. Whedon, dated April 30, 1921, Mr. Keehn stated:

GENTLEMEN: We have prepared a rough draft of new Articles of Association, effective from May 1, 1921, to July 1, 1922, and are sending each of you a copy for such suggestions in the way of revision as you may wish to make.

Several new features have been incorporated as the result of experience, etc., since the old Articles were formulated. You will note that in Article II, "Objects" we have included some of our creed as it appears in our advertising literature, and that we have inserted a clause regarding actually completed and closed busi-

ness transactions, which, of course, refers to our Weekly Sales Reports; we have also declared our intention regarding Surveys of Cost and what we consider the fundamental elements to be used in arriving at the basis of ascertaining cost to the manufacturer of producing and placing on the market Maple, Beech, and Birch flooring.

It is my thought, when we prepare an Average Cost Chart, that Frame A will represent the average cost F. O. B. cars at flooring plants and subsequent frames will show the cost of delivering to destination, which would mean Frame A plus average cost of freight, and this average cost of freight would be based upon the freight rate from Cadillac, Mich., which we consider represents the average freight rate from all the flooring mills to all the destinations. I thought it unnecessary to mention delivered values in the Articles of Association, as whatever Average Cost Charts are compiled to show the delivered prices would be simply mathematical and a supplemental detail, which would not in any way be contrary to the principles outlined in Article XIV.

We are waiting to hear from Mr. Thomas before proceeding further with the other plan discussed at the meeting, and in this connection, perhaps it would not be out of place for me to say that, in view of the representations made by Dr. Earle as President of the Association, in his last letter to Mr. Nebeker (a copy of which you have), and also in view of the resolution adopted at the general meeting held on February 25, and approved at the meeting

held on April 27, we should carefully consider any new plan, the adoption of which might raise a doubt in the mind of Mr. Nebeker as to the sincerity of the representations in Dr. Earle's letter, evidence of which sincerity the Department of Justice may call upon us for at any time, and also as to the sincerity of the resolution adopted February 25, and approved April 27.

By the way, I see by the newspapers this morning that the Federal Trade Commission has again attacked the Pittsburgh base used by the steel industry and that the Commission is also going into the question of fixing prices by all the steel manufacturers by using the Pittsburgh base. It seems the Commission is divided on the question, three of the members opposing the Pittsburgh base and two of them not opposing it. (Vol. IV, pp. 534-535.)

The record does not contain the minutes of a meeting held May 20, 1921, but in a letter to members dated May 26, 1921, Mr. Keehn stated:

GENTLEMEN: Only three of the members who attended the general meeting on the 20th and who promised then to make the weekly reports of sales did not make their reports for the week ending May 21st. No doubt they are under the impression that the *new Plan under which these reports are to be made by every member of the Association*, would begin with the week ending May 28th, instead of with the week ending May 21st. (Vol. IV, pp. 451-452.)

The record does not definitely establish the nature of the "new plan" referred to, but Exhibit 43 JJ (Vol. III, side pp. 2394-2399) is a report dated October 6, 1921, entitled "Audit Changes, June 2 to July 8, 1921, In Members' Weekly Sales Reports," so it is apparent that the "new plan" required all the members to report all their sales, and provided for an audit to make certain that was done.

In a letter to Mr. Keehn dated May 26, 1921, which was circularized to the members under date of May 28, 1921, the East Jordan Lumber Company stated:

We have your favor of the 21st and are exceedingly sorry that the minimum price plan did not go through, as we feel this is the only plan which has ever worked out satisfactorily, and that it would be especially valuable to us at this time. (Vol. III, p. 313.)

Whatever may have been the fate of the Minimum Price Plan at the May 20, 1921, meeting, the record contains a table dated May 21, 1921, entitled "Concessions and Additions—Table of Values May 21, 1921," which states "13/16" Maple and Birch D. & M. All Grades and Faces, Full List," gives the concessions and additions for other faces, grades, and woods, and also stated the rules with reference to commissions and terms of sale. (Vol. III, p. 326.) A letter to members dated June 3, 1921, shows that this concession sheet had been sent out the preceding day with Tables of Values for 13/16 and 3/8" flooring as new fillers for the Rate Books, and also that the

list of wholesalers and commission men was being revised and reprinted and that the names of unclassified dealers would be passed upon by the committee the same as theretofore before being listed. (Vol. III, pp. 313-314.) Apparently the Trade Relations Committee had charge of that matter, as the call for a meeting to be held July 8, 1921, stated that that committee might have a report to make regarding the list of wholesalers and commission men. (Vol. IV, p. 452.)

A letter to members dated August 11, 1921, calling a meeting to be held August 19th stated:

Our weekly Sales Reports indicate considerable demoralization in the flooring situation and it seems absolutely necessary that every member should be represented at the meeting so that greater cooperation can be assured and conditions in the industry, which are now much disturbed, can be stabilized. (Vol. IV, p. 567.)

And the action taken at the meeting with reference to that matter is stated in the following paragraph in the minutes:

Revise Articles of Association.—After a prolonged discussion of the demoralized conditions in the flooring industry, the Secretary was instructed to prepare a draft revising the Articles of Association with the view of securing greater cooperation in the industry, and to have the draft of the revision ready to submit to the next general meeting of the Association. (Vol. III, p. 138.)

A letter to members dated September 16, 1921, transmitted to the members the proposed articles of association dated October 1, 1921, the principal features of which have been explained heretofore on pages 14 and 17, and stated:

GENTLEMEN: In accordance with your instructions at the last general meeting of the Association, the proposed revision of the Articles of Association has been drafted and in order that you may have an opportunity to study them before the next meeting is held, we are enclosing a copy which, for your greater convenience, is in printed form. The printer is holding the type set up so that further revisions can be made, if desired.

Several changes are suggested in this proposed revision, namely:

Article II, "Objects," have been made more general and include "the exchange of information concerning the character and nature of actually completed and closed business transactions of its members." This refers to the Weekly Sales Reports, etc.

Article XIV, "Determining average cost" is entirely new. (Vol. IV, pp. 568-569.)

It is now expected that a general meeting of the Association will be held on Friday, the 23d and that a meeting of the Special Committee will be held on Thursday, the 22d, in order to draft some simple memorandum along the lines suggested at the last meeting and submit same to the general meeting on the 23d.

Conditions in the industry as reflected in the Weekly Sales Reports are greatly demoral-

ized, as all of you, of course, know, and if any progress whatever is to be made in the work of the Association, it is absolutely necessary that every member be represented at the next meeting, with full power to act, so that definite conclusions can be arrived at then and there. (Vol. IV, p. 570.)

The above letter also appears in the record as Exhibit 6 (Vol. III, p. 61), but as cited under the above quotation the letter is a part of Exhibit 77, and it was introduced in evidence in connection with three undated "Rough Drafts," each entitled "Declaration of Our Business Policy." The three forms are substantially the same, so only Form 2, which is as follows, need be quoted:

Believing that the sale of any commodity below the cost of production is unfair competition and is certain to be ruinous and destructive to any industry and consequently is detrimental in the long run to public welfare, we hereby voluntarily agree, regardless of what other manufacturers of flooring may do, to pay into the Treasury of the Maple Flooring Manufacturers Association, Ten per cent (10%) on any and all sales we may make of Maple, Beech, and Birch flooring, 13/16" and thicker, of standard grades and lengths at values below the average cost of production, plus the average cost of freight to destination, as ascertained from time to time by the Maple Flooring Manufacturers Association's Survey of Costs and Tables of Values Based Upon Average Cost, after allowing for com-

missions not exceeding \$2.00 per M feet to Wholesalers and Commission Men and to our own Special Representatives. And the said Ten per cent (10%) shall be reckoned upon the average cost of said flooring delivered at destination as indicated by the Maple Flooring Manufacturers Association's Rate Book. (Vol. IV, p. 568.)

The record does not contain any other evidence with reference to new plans or proposed Articles of Association until the Articles of January 1, 1922, were under consideration. The provisions of those Articles relating to "Determining Average Cost" have been quoted in full on page 7. Accepting Mr. Keehn's statements with reference to the Minimum Price Basis, that it was simply a statement of business policy and that the Association did not advise it but gave it to the members to use in such way as they wished, the January 6, 1921, Minimum Price Basis and Articles XIV, Determining Average Cost, in the January 1, 1922, Articles of Association, would be identically the same thing except for the omission of the rules with reference to commissions and to terms of sale. Considering all the evidence, however, it appears that the Minimum Price Plan established minimum prices by agreement and prescribed penalties (which may or may not have been enforced) for their nonobservance; that the Minimum Price Basis established minimum prices by agreement without providing for their maintenance except through the comparisons made in the weekly

sales reports, and that the present Articles of Association establish minimum prices without an *express* agreement for their observance, and without the direct comparison being made on the sales reports, while nevertheless making it impossible for any member to prevent his deviations becoming known by requiring such member to report every sale. The evidence with reference to the various "new plans," "declarations of business policy," and proposed Articles of Association considered by the defendants during 1921 after their abandonment of the Minimum Price Basis, establish clearly that it was their purpose and intent to reinstate the Minimum Price Plan in a form which would not be the Minimum Price Plan, and that the present Articles of Association are the result of their efforts along those lines.

V

Construction and circulation of list or base prices

In fact the Minimum Price Basis Plan has been in operation, though not under that name, ever since 1913. The members of the Association during the entire time since that date have distributed among themselves by the secretary lists designating what are called "Cost Prices" of the various grades and dimensions of flooring, *but which are nothing more nor less than minimum prices that are intended to be, and actually are, observed.* Mr. Keehn says:

I think we commenced, originally, in 1913 under what we termed "scientific list." That

was based on the old work of the Market Conditions Committee.

We are using it to-day. (Vol. I, p. 110.)

The preparation and distribution of the first so-called "cost list" which is variously referred to in many of the circulars, reports, and minutes in the record as the "Scientific List" or "Scientific Price List" (Vol. III, p. 114, p. 207, p. 228, p. 230), the "Recommended List" (Vol. III, p. 205), the "Logical Basis of Values Table" (Vol. III, p. 211) and the "Delivered Table of Values" or Table of Values (Vol. III, p. 213, p. 215, p. 222, p. 238) was authorized at the annual meeting of the association held January 22, 1913 (Vol. III, p. 106 and p. 108). The portion of the memorandum of the meeting covering this matter reads as follows:

It was the opinion of the members present that considering the present market values of rough lumber and the actual costs of manufacturing and selling flooring, the present values of flooring are entirely too low, and it was suggested that at the next meeting of the Market Conditions Committee, the Committee figure out what the selling values of flooring would be if a logical and scientific method of determining values of flooring were used, that is, if the selling values of flooring were based upon the cost of raw material plus manufacturing and selling costs and plus a reasonable profit. (Vol. III, p. 106.)

The references heretofore given to the first "Scientific List" or "Table of Values" establish that it

was printed under date of May 21, 1913. No other such list or table was prepared and distributed to the members until the Minimum Price Plan was adopted in 1916, when a new rate book containing the Index of Towns and Table of Values of May 15, 1916, referred to in the Plan (Vol. III, p. 79) was printed (Vol. III, p. 242). The memoranda of Association meetings and the Reports of the Market Conditions Committee contained in the record for the period from 1913 to May, 1916, are not complete, but they disclose only one instance during that period, in January, 1915, when a change in the delivered values was recommended on the basis of new data covering manufacturing and selling costs and the current value of the raw material (Vol. III, pp. 230-231), whereas they disclose ten instances where recommendations as to the current price obtainable (in terms of additions to or concessions from the list of May 21, 1913) were made by the Market Conditions Committee solely on the basis of analyses of the association statistics as to stocks, shipments, and production, new business booked, and current net values. These instances are shown by the Reports of the Market Conditions Committee dated respectively March 25, 1914 (Vol. III, pp. 204-205), June 25, 1914 (Vol. III, pp. 210-211), August 22, 1914 (Vol. III, pp. 214-215), September 24, 1914 (Vol. III, pp. 216-220 at 219), October 30, 1914 (Vol. III, pp. 220-222), November 20, 1914 (Vol. III, pp. 222-224), December 18, 1914 (Vol. III, pp. 225-226),

February 25, 1915 (Vol. III, pp. 231-233), April 15, 1915 (Vol. III, pp. 237-239), and May 26, 1916 (Vol. III, pp. 240-242).

That general market conditions had a more controlling effect than actual costs in determining minimum prices even during the time when the Minimum Price Plan was in effect, is shown by the recommendation of the Market Conditions Committee under date of August 21, 1919, for an advance in the minimum price in accordance with the procedure established by Article IV of the plan. This recommendation reads as follows:

Raw Material Higher.—Since the last meeting of the Committee there has been an advance in the market value of rough flooring lumber, according to reliable information given to the Committee in regard to several recent sales on the open market. *If the advance in the rough lumber and the steady increases in Manufacturing and Marketing costs were fully met, an advance of \$10.50 in the M. P. P. Basis would be required, but in view of all conditions, the Committee recommends horizontal advances of \$6.00 on Clear, \$6.00 on No. 1, and \$5.00 on Factory $\frac{1}{8}$ " and thicker Maple, Beech, and Birch floorings, effective immediately with the understanding that old quotations now outstanding may be protected, if desired, up to August 30th, inclusive.*

Please advise the Secretary immediately upon receipt of this report whether or not you concur in the recommendation of the Committee, and if the recommendations are

adopted, new Concession sheets will be printed and mailed you at once. (Vol. III, pp. 250-251.)

And with reference to the computation of costs, Keehn says:

This same method has been pursued at different times and we have a number of those calculations going way back to 1913. (Vol. I, p. 109.)

There are three general elements that enter into the computation of these so-called cost prices:

1. Manufacturing costs;
2. The cost price per thousand feet of rough lumber out of which the flooring is made; and
3. The percentage of waste in converting the rough lumber into flooring.

With reference to manufacturing costs, the secretary, Keehn, says:

The information from which we figured out the cost of production came from the members of the association. We had no information from nonmembers regarding their cost of production. Referring to Gov. Ex. 23 (a sheet entitled "Survey of Costs, 3rd Quarter, 1922") we use the same form but employ different calculations. We are still sending out the questionnaire above referred to and by means of them ascertain the average of actual costs. (Vol. I, pp. 104-105.)

The questionnaire now sent out was read into the record by this witness and appears on page 108, Vol. I. The secretary takes the replies from the

several members and makes an average of them all; and a questionnaire with a composite of answers as to marketing costs of lumber produced during January, February, and March, 1922, is filed as Gov. Ex. 25 (Vol. III, p. 279) and is as follows:

Per 1 M Ft.
of Flooring
Produced

1. Labor taking lumber off of dock, car, pile, or wagon and placing in dry kiln, including expenses of night fireman...	\$1. 16
2. Cost of manufacturing into flooring and putting flooring in warehouse, including twine, oil, belting, and other factory supplies, and factory repairs and including manufacturing administrative expenses.....	8. 34
3. Warehouse expense and loading into cars or on wagons.....	. 90
4. Insurance and taxes. (Divide $\frac{1}{4}$ of annual amount by quantity of flooring produced during January, February, and March).....	1. 07
5. Interest of 6% on value of plant and on value of average stock carried of rough flooring lumber and of finished flooring. (Divide $\frac{1}{4}$ of annual amount by quantity of flooring produced during January, February, and March).....	1. 92
6. Selling expenses, including commissions and advertising, and office expenses including selling administrative expenses.....	3. 75
7. Cash discount.....	. 80
8. Annual depreciation on flooring plant as is usually allowed by the United States Government. (Divide $\frac{1}{4}$ of annual amount by quantity of flooring produced during January, February, and March).....	1. 37
9. Total per M feet.....	19. 31
10. Less net profit from wood and other by-products of flooring lumber, per 1 M feet of flooring produced during January, February, and March.....	1. 32
11. Actual Manufacturing and Marketing Costs per 1 M feet of flooring produced during January, February, and March.....	17. 99
MAY 31, 1922.	

The questionnaire read into the record (Vol. I, p. 108), which appears to have been in use in 1923 some time after this action was begun, contains two queries not included in this composite questionnaire, to wit, "Quantity of flooring produced by us during July,

August, and September” and “Our percentage of waste in manufacturing flooring during July, August, and September,” but the information thus asked for was obtained in other ways. With reference to the cost of rough lumber, Mr. Keehn says:

When an estimate of cost was made we also had the market value of the rough lumber as established by sales in the open market. We might have such information from the lumber trade papers or from sales made by sawmill operators of flooring lumber on the market or from members of the Association who had purchased the rough lumber on the open market. We used all sources of information. This information was sent in by members of the Association, sometimes to me, sometimes to the Market Conditions Committee, all for the use of the Market Conditions Committee. Sometimes during the past year we would get this information at meetings of the Association by asking each one what he was paying for rough maple lumber on the open market, actual sales. The Committee on Cost Surveys ordinarily came to the conclusion as to what information was to go out in my reports to the members. The cost of rough maple lumber was taken by using several purchasers—five, six, eight, or ten—and we might take the average the same as the Government does in compiling its data regarding the value of rough maple lumber on the open market. (Vol. I, p. 104.)

From the beginning there has been a Committee who had special duties to perform in regard to con-

structing these price lists of flooring. Formerly it was called the "Market Conditions Committee," but now is known as the "Cost Surveys Committee." With reference to the functions of this Committee, Mr. Keehn says:

The Cost Surveys Committee does not perform exactly the same function as the Market Conditions Committee did. The Committee on Cost Surveys simply go into the cost of the raw material, the cost of marketing and manufacturing, and takes no notice of any kind of the selling price of flooring. (Vol. I, p. 105.)

However, it is apparent from Mr. Keehn's testimony (Vol. I, pp. 104-110) that the information was all gathered and the computations made by himself, and that the actual work done by the Committee was but perfunctory. In fact, Mr. Dewey, Chairman of the Cost Surveys Committee, testifies to that effect. (Vol. I, pp. 396-399.)

The information as to the amount of waste resulting from converting rough lumber into flooring is obtained by one or more members making what is known as "Test Runs." Sometimes the same member makes several runs, and at other times the runs are made by different members, and the estimates are based upon the average waste resulting from the several runs. The manufacturer making the run keeps a record of the quantity of each grade of rough lumber used and also of the quantity of each grade and dimension of flooring produced, and, of course, the difference is the amount of waste.

The final result is obtained by putting together the three elements mentioned, and then determining the alleged cost price of each grade and dimension. A careful study of the table will show that this work, especially that of distributing the cost price between the various dimensions, is done by a genius. With reference to how often the estimates are made, Mr. Keehn says:

We make those estimates from time to time according to when the market changes on rough lumber or according to when the manufacturing and marketing costs are changed. There is no definite period. We make them at very irregular intervals. I would say without looking it up we made perhaps three or four during 1922. (Vol. I, p. 110.)

This witness undertook to explain how the estimates are made (Vol. I, pp. 105-106), but, presumably through error of the stenographer in taking figures, but few of the results stated can be obtained from the quantities given, and the estimates can be more readily understood from a study of the tables themselves. Exhibits 25-A, 26, 27, and 28-N (Vol. III, pp. 280-289 and 315-317) are four estimates, all based on "the three test runs of 1921, made by North Branch Flooring Company, Chicago, in January, 1921, and between May 1 and September 10, 1921." For the element of manufacturing and marketing costs the first of these estimates (Exhibit 28-N) was based on an estimate of average of such costs for the first half 1921; the second estimate (Exhibit 25-A)

was based on such costs for the first quarter of 1922 (p. 280); the third estimate (Exhibit 26) was based on such costs for the third quarter 1922 (p. 284); and the fourth estimate (Exhibit 27) was based on such costs for the last quarter 1922 (p. 288).

Taking the first estimate (Exhibit 28-N, Vol. III, p. 315) as an illustration, it may be helpful to separate the table into its three essential parts, the first part of which, showing the amount of waste, is as follows:

Rough Lumber Used

No. 1 Common.....	792 M Ft.	51.5%
No. 2 Common.....	562 M Ft.	36.5%
No. 3 Common A.....	185 M Ft.	12.0%
	<hr/>	
	1,539 M Ft.	100.0%

Flooring Product

Clear.....	646 M Ft.	52.0%
No. 1.....	383 M Ft.	30.7%
Factory.....	215 M Ft.	17.3%
	<hr/>	
	1,243 M Ft.	100.0%
Waste.....	296 M Ft.	19.2%

Lumber Used..... 1,539 M Ft.

This part is, of course, the same in all of the estimates.

It appears strange, however, that such a large percentage of No. 1 Common lumber is used in making the test runs, as Mr. Saunders testified that the better end of No. 1 Common rough maple lumber is not generally used in the manufacture of maple flooring because it is not profitable to do so as a better price can be obtained for it on the market than can be obtained by working it through the flooring factory. (Vol. I, p. 197.)

The second part, which purports to show "Average Cost f. o. b. flooring plant of 1,000 feet of flooring sold," is as follows:

51. 5% No. 1 Common, @ \$39.50.....	\$20. 34
36. 5% No. 2 Common, @ \$24.50.....	8. 94
12. 0% No. 3 Common A, @ \$11.50.....	1. 38
<hr/>	
100. 0%	
1,000 Ft. Lumber Cost.....	30. 66
<hr/>	
800 Ft. Flooring Costs.....	30. 66
<hr/>	
1,000 Ft. Flooring Costs.....	37. 95
<hr/>	
Manufacturing and Marketing Costs, Average First half 1921:	
Avg. of 8 Reports.....	\$22. 28
Less Value of Wood ——— Average.....	1. 24
	<hr/>
	21. 04
<hr/>	
	58. 99
Add 5% for Contingencies.....	2. 95
<hr/>	
Average Cost F. O. B. Flooring Plant of 1,000 Ft. of	
Flooring Sold.....	61. 94

Mr. Keehn claims that by resolution of July 19, 1923, four and a half months after this action was begun, it was directed that the element of 5% for contingencies be eliminated from the calculations. (Vol. I, p. 152.)

In the other estimates the results are different because based on different prices of rough lumber, and different estimates of average manufacturing costs.

There is a fourth section which shows the quantity of each grade and dimension produced. But those figures also appear in the third section, which purports to show the cost price per thousand of each grade and dimension, and is as follows:

Clear:

$1\frac{1}{2}$ x $1\frac{1}{2}$ "	2.5%	\$85.00	\$2.13
2"	3.3%	83.00	2.74
$2\frac{1}{4}$ "	41.7%	90.00	37.53
$3\frac{1}{4}$ "	2.1%	80.00	1.68
$\frac{3}{8}$ " All Faces	2.4%	60.00	1.44
	<u>52.0%</u>	<u>-----</u>	<u>\$45.52</u>

No. 1:

$1\frac{1}{2}$ x $1\frac{1}{2}$ "	1.3%	53.00	.69
2"	2.5%	53.00	1.33
$2\frac{1}{4}$ "	24.9%	60.00	14.94
$3\frac{1}{4}$ "	.7%	60.00	.42
$\frac{3}{8}$ " All Faces	1.3%	45.00	.59
	<u>30.7%</u>	<u>-----</u>	<u>\$17.97</u>

Factory:

$1\frac{1}{2}$ x $1\frac{1}{2}$ "	.7%	15.00	.11
2"	.9%	23.00	.21
$2\frac{1}{4}$ "	14.7%	25.00	3.68
$3\frac{1}{4}$ "	.8%	27.00	.22
$\frac{3}{8}$ " All Faces	.2%	10.00	.02
	<u>17.3%</u>	<u>-----</u>	<u>4.24</u>
Total	100.0%	<u>-----</u>	<u>\$67.73</u>

The first division of this table is easily understood, as is also the second, assuming that the cost prices of rough lumber and cost of manufacturing are correct. But on what principle are the prices divided between the different grades and dimensions of flooring, so as to make up approximately the average cost shown by the second part of the table? There is nothing to show that the waste of manufacture of one grade of rough lumber is greater than that of another, and the cost of manufacturing the different grades of flooring is the same, or practically so. Therefore the only element upon which to base a difference in the *cost* prices of different dimensions of flooring is the difference in the prices of the

grades of rough lumber; and it does appear that the *average* of the grades of the finished product bears about the same relationship to the prices of the grades of rough lumber. That is, the average prices of the different dimensions of "clear" flooring is a little more than twice as much as the price of "No. 1 Common" rough lumber, and the same is true as to No. 1 and Factory grades of flooring and No. 2 Common and No. 3 Common A of rough lumber. But in estimating *costs* why should $1\frac{3}{8} \times 1\frac{1}{2}$ " Clear be put at \$85 while the same thickness, face 2", is put at \$83, that facing $2\frac{1}{4}$ " at \$90, that facing $3\frac{1}{4}$ " at \$80, and all faces of $\frac{3}{8}$ " Clear is put at only \$60? Here is a spread of \$25 between the several dimensions of the same grade. In No. 1 there is a spread of \$15, all faces of $\frac{3}{8}$ " being estimated at \$45, while $2\frac{1}{4}$ " and $3\frac{1}{4}$ " face of $1\frac{3}{8}$ flooring is estimated at \$60. And why should $1\frac{3}{8}$ " x $3\frac{1}{4}$ " Factory be estimated to cost \$27, while $\frac{3}{8}$ " all faces is computed at \$10? *Necessarily these are not COST figures at all, but are the prices the Committee or Secretary Keehn advised the members they should charge for different grades and dimensions of lumber.*

This is further manifested from a comparison of the advances made in the prices of the several grades and dimensions in the four estimates above mentioned. For convenience of comparison a table showing such advances, and also the prices of rough lumber upon which the several estimates were based, and the average prices of manufacture, is here given.

First part

[Showing prices of different grades and dimensions of flooring in the four estimates based upon the three runs made by North Branch Flooring Company in 1921]

	First Est.	Second Est.	Increase	Third Est.	Increase	Fourth Est.	Increase
Clear:							
$\frac{1}{2}$ x $1\frac{1}{2}$ "	\$85	\$85	\$0	\$90	\$5	\$90	\$0
x 2"	83	87	4	90	3	95	5
x $2\frac{1}{4}$ "	90	90	0	95	5	100	5
x $3\frac{1}{4}$ "	80	85	5	80	-5	85	5
$\frac{3}{4}$ All Faces	60	60	0	65	5	65	0
No. 1:							
$\frac{1}{2}$ x $1\frac{1}{2}$ "	53	68	15	78	10	78	0
x 2"	53	72	19	80	8	85	5
x $2\frac{1}{4}$ "	60	75	15	85	10	90	5
x $3\frac{1}{4}$ "	60	75	15	75	0	80	5
$\frac{3}{4}$ All Faces	45	45	0	45	0	45	0
Factory:							
$\frac{1}{2}$ x $1\frac{1}{2}$ "	15	20	5	25	5	30	5
x 2"	23	28	5	35	7	40	5
x $2\frac{1}{4}$ "	25	30	5	40	10	45	5
x $3\frac{1}{4}$ "	27	35	8	45	10	50	5
$\frac{3}{4}$ All Faces	10	10	0	15	5	20	5

Second part

[Showing estimated average cost of flooring and the prices of the three grades of rough lumber entering into said estimates]

	First Est.	Second Est.	Increase	Third Est.	Increase	Fourth Est.	Increase
Average cost of flooring per M	\$61.94	\$73.53	\$11.59	\$80.33	\$6.80	\$84.00	\$3.67
Price No. 1 Com	39.50	51.00	11.50	56.00	5.00	61.00	5.00
Price No. 2 Com	24.50	36.00	11.50	41.00	5.00	41.00	0.00
Price No. 3 Com. A	11.50	22.00	10.50	26.00	4.00	30.00	4.00

It might be claimed that the prices of the several grades of flooring should be increased or diminished according to the advance or fall of the prices of the corresponding grades of rough lumber. In other words, there are three grades of rough lumber used in the manufacture of the three grades of flooring; and no doubt most of the clear flooring is manufactured from No. 1 Common, and No. 1 flooring is made from No. 2 Common, and the factory flooring is

made from No. 3 Common A lumber. The witness Green testifies in effect that such is the fact (Vol. I, p. 386). Therefore there may be reason in increasing or diminishing the prices of clear flooring in proportion to the advance or fall of the price of No. 1 lumber, and the same is true as to No. 1 flooring and No. 2 Common lumber, and factory flooring and No. 3 Common A lumber. But in estimating costs, what justification is there for making a *difference in the advance of the different dimensions of the same grade?* A study of the foregoing table will show that the increase of prices on lumber has no relationship whatever to the advance of the prices of the grades of flooring. In the second estimate there was an average increase of \$11.59 in the price of lumber over the first estimate, and the increase in prices of the grades of rough lumber were:

No. 1 Common	\$11. 50
No. 2 Common	11. 50
No. 3 Common A	10. 50

But prices of three dimensions of clear flooring were not increased at all, while $1\frac{1}{2}$ x 2" was increased \$4, and $1\frac{1}{2}$ x $3\frac{1}{4}$ " was increased \$5. Moreover, there was no increase in No. 1, $\frac{3}{8}$ All Faces, but the prices of the several faces of $1\frac{1}{2}$ were increased: $1\frac{1}{2}$ ", \$15; 2", \$19; $2\frac{1}{4}$ ", \$15; and $3\frac{1}{4}$ ", \$15; and the prices of factory were increased 3 faces of $1\frac{1}{2}$, \$5; and $3\frac{1}{4}$, \$8; and there was no increase in $\frac{3}{8}$ All Faces.

The increase in the third over the second estimate of the average cost of rough lumber was \$6.80, this estimate being based upon an increase of price of

\$5 each of No. 1 and No. 2 Common, and \$4 in the price of No. 3 Common A. In distributing this increase among the grades and dimensions, *three of the dimensions of the Clear grade, including 3/8 all faces, were advanced \$5 each, one, 2" face, was advanced \$3, and one, 3 1/4", was reduced \$5.* And in No. 1 Flooring, two dimensions were advanced \$10 each, one dimension \$8, and the other two remained the same. And the prices of two dimensions of factory were advanced \$10 each, two \$5 each, and the other dimension \$7.

The estimated average increase of cost in the fourth estimate was \$3.67, which was based upon an increase in cost of \$5 for No. 1 Common, no increase for No. 2 Common, and \$4 for No. 3 Common A. But distributing this among the several dimensions of *flooring*, three dimensions of Clear were advanced \$5 each, and two remained the same, three dimensions of No. 1 were advanced \$5 and two remained the same, while all dimensions of factory were advanced \$5.

It is perfectly apparent, therefore, that the distribution of the increase or decrease of the so-called cost of production between the different grades and dimensions has no relationship whatever to the advance or decrease in cost; but is based entirely upon other influences, which unquestionably are the prevailing and prospective conditions of the market. In other words, the secretary of the association, aided to some extent by the Committee, surveys the entire situation and makes up a price list which, so far as the relative price of grades

and dimensions is concerned, is wholly arbitrary and not controlled in the least by any of the elements that appear in the cost of production.

In fact Keehn incidentally admits as much. The court pointed out a differential of \$10 between "beech, 13/16th dressed" and "matched, all faces" and asked if that was substantially a continuing differential, and Keehn replied:

Not at all times. It depends upon the supply and demand of these different floorings, to what a man's stock conditions are, and the cost of it, too. (Vol. I, pp. 153, 154.)

It is this pretended cost price list that is distributed among the members to be observed as the minimum prices at which the flooring is to be sold.

That the manipulation of the spreads between the different sizes and grades of flooring and between the different woods is not based on cost but is purely arbitrary and designed to reflect current market conditions, is clearly established by the following quotations from letters sent out to the members by the Secretary, from Reports of the Market Conditions Committee, and from minutes of meetings during the period from 1913 to 1922.

M. C. C. Report, March 25, 1914

The better movement in Factory should be noted because it indicates that better prices should now be obtainable for this grade, especially in view of the fact that 70% of the 2¼" Factory was sold on March 1st as against only 39% on January 1st. (Vol. III, p. 204.)

M. C. C. Report, January 29, 1915

Early in 1913 a Scientific Price List was made which represented a profit of 10% on F. O. B. mill prices. *This was based on the then current values of lumber, the cost of labor, and the selling expense.* The Price List has not been changed since that time. During 1914 it was decided to revise the data to show the present cost of manufacturing and selling flooring. This has been done, and the result is given in our monthly report of this date.

In our monthly reports of market conditions we have endeavored to reflect, as accurately as the available data would permit, what has seemed to us a conservative average of conditions. Based upon statistical information and the prices you have reported, your Committee has made from month to month an estimate of the prices obtainable. (Vol. III, p. 228.)

**Letter, Keehn to John Schroeder Lumber Co.,
Jan. 30, 1915**

I would like to urge upon you to carefully read and study the annual reports reviewing the work of the Association during the year, and especially the report of the Market Conditions Committee for December, which covers the data collected regarding manufacturing and selling costs, and to which is attached a table illustrating our so called Scientific List brought up to date. *This table is figured on the basis of the present market value of the raw material, manufacturing and selling costs, and present selling values for flooring as applied to the six test runs which were used in the construction of the original Scientific List in 1913.* (Vol. III, p. 234.)

M. C. C. Report, May 18, 1917

In exchanging trade experiences, members of the Committee report the demand strong for Factory and No. 1, particularly for Factory, and it is their opinion that this demand will continue strong and grow stronger on account of the class of buildings now in course of construction and which are likely to be built during the summer and fall. *It is the view of the Committee that on account of the oversold condition of Factory and the heavy prospective demand for it that much higher prices than present values can be readily obtained.* As the No. 1 grade moved up 62 points during April and as the demand for it seems likely to increase, it should also command higher levels of value.

The opinion was expressed that the present Spreads between Clear and No. 1 and between No. 1 and Factory are larger than are justified by market conditions, and we would be glad to have your views on this subject. The Secretary will send you blank forms requesting an expression from you in the form of a vote for our guidance, so we can consider the question at our next meeting and make some recommendation to the Association. (Vol. III, pp. 243-244.)

Memo. of Meeting, Nov. 17, 1921

Stronger Market.—Trade conditions and our statistical reports for the month of October were discussed. Clear and No. 1 Maple Flooring $\frac{1}{2}$ " x $2\frac{1}{4}$ " face are both in a very strong position, as indicated by their oversold condition, the Clear being sold 232% and the

No. 1 sold 208%. The improvement in the demand for No. 1 is particularly noticeable, as it was sold only 45% on August 1st compared with 208% sold on Nov. 1st.

In view of recent advances in the market value of rough Maple Flooring lumber and taking into account Manufacturing and Marketing Costs and the relations of supply and demand as indicated by the heavily oversold condition of Clear and No. 1, it was the consensus of opinion as follows:

1. That present market values of Maple Flooring $1\frac{3}{4}$ " are represented by Frame "A" Basis, Table of Values dated 5-21-21, at Full List for Clear and No. 1 and a concession of \$5.00 on Factory.
2. That the spread of \$7.00 between 2" and $2\frac{1}{4}$ " in Clear and No. 1 is excessive and that a spread of \$3.00 would be more representative of the difference in the intrinsic value of the two faces.
3. That the spread between Clear $3\frac{1}{4}$ " and $2\frac{1}{4}$ " be reduced from \$10.00 to \$5.00, and the spread between Factory $3\frac{1}{4}$ " and $2\frac{1}{4}$ " be changed from \$2.00 to \$5.00.
4. That the market values of Birch are equal to Maple, and that Beech Clear and No. 1 are \$10.00 less than Maple and Birch, and that Beech Factory is equal in value to Maple and Birch Factory.
5. That the Table of Values dated May 21, 1921, covering $\frac{3}{8}$ " represents the present market value of $\frac{3}{8}$ ". (Vol. III, p. 141.)

The action taken at the November 17, 1921, meeting was recommended by the Market Conditions Committee in a report dated October 28, 1921 (Vol. III, pp. 253-255, at 255), and is shown by circular letters from Mr. Keehn to the members dated November 17, 1921, and December 1, 1921, to have been used as the basis of a new "Table of Values" printed under the same date (Vol. III, pp. 142-143 and p. 318.)

The Government filed a number of other estimates based upon varying numbers of runs made by members, which are:

- Exhibit No. 28, Vol. III, p. 291.
- Exhibit No. 28A, Vol. III, p. 294.
- Exhibit No. 28B, Vol. III, p. 296.
- Exhibit No. 28D, Vol. III, p. 300.
- Exhibit No. 28E, Vol. III, p. 302.
- Exhibit No. 28F, Vol. III, p. 304.
- Exhibit No. 28G, Vol. III, p. 307.
- Exhibit No. 28H, Vol. III, p. 310.

The first of these was dated January 29, 1915 (p. 293), and the last March 1, 1920 (p. 312). In each of them there was added 10% profit on selling prices f. o. b. mill, and to some a note was added, as, for illustration, to Exhibit 28G, to wit (Vol. III, p. 309):

To Realize a Profit of "Cost Plus" 10% (the method frequently used by the Government during the war in making its purchase contracts) instead of a 10% Profit on Sales, the profit would be \$5.63 instead of \$6.26, a difference of 63 cents; in that case the flooring manufactured in these Seven Test Runs,

which have been consolidated and considered one run, should sell for \$61.97 instead of \$58.98, or \$2.99 more than selling basis of May 13, 1919.

In the estimates made during 1922 this 10% profit is omitted, and the witness Keehn says that the estimate as now made contains no element of profit (Vol. I, p. 107). But it will be observed that the answers to the questionnaire, from which the average manufacturing and marketing costs are estimated, add 6% on the value of the plant and the average stock carried of rough lumber and of finished flooring, and, until after this action was begun, in each of the estimates 5% was added for contingencies. *But what difference can it make whether any per cent is allowed on the average estimated cost or not, when the prices upon the several grades and dimensions are manipulated at will?* The advance may be far beyond 10% on those dimensions for which there is a demand and which are being sold in large quantities, and be reduced to nothing on the dimensions for which there is no demand at all.

There is another feature which shows that this estimated cost has really but very little to do with the actual cost of flooring that is manufactured and sold upon the market. In the test runs a record is kept of the relative amounts of the different grades of rough lumber that are used, and the estimates are all based upon the average price of the lumber for those three grades. *But manifestly in the operation of their mills, the relative quantity of these grades is not observed*

at all, and therefore the cost of the lumber actually produced does not correspond at all with the costs upon which the estimates are based. For instance, suppose there is a greater demand in the market for No. 1 flooring than for Clear, then the rough lumber used will be more of No. 2 Common and less of No. 1 Common; or if there is a greater demand for Factory and less for Clear and No. 1, then a very large percentage of the rough lumber will be No. 3 Common A; and the estimates all show that the price of such lumber is less than half of the price of No. 1 Common. Undoubtedly after the second estimate had been sent out, there was a great increase in the quantity of No. 1 flooring produced, and but little, if any, in clear, as the great increase in the prices of No. 1, as compared with the increase in prices of clear, no doubt resulted from the increased demand for No. 1. Therefore, there was a much greater relative quantity of No. 2 rough common lumber used, and a corresponding decrease in the cost of production. And the same may be said as to No. 3 Common A rough lumber after the third price list was sent out, in which there had been a large relative increase in the price of factory flooring.

A thorough analysis of these pretended estimates of cost of production and the formulation of price lists based thereon demonstrates beyond a shadow of controversy that they were a mere device used for the fixing of minimum prices to be observed by the members of the Association.

But let it be supposed that these estimates were based upon actual figures and that the correct average estimates were made. In other words, that the price of each grade and dimension of flooring given in these tables was the exact average cost price of production of such grade and dimension, yet it would destroy some of the essential elements of competition, and would be violative of the Antitrust Act. The foundation upon which competition rests is the ability of one manufacturer to produce his article cheaper than another, which enables him to sell it at a less price than that at which his competitor can sell his product. Necessarily there must be a difference between the actual cost of production by the several manufacturers who are engaged in producing the same article; in fact, half of the members of this association produce their own rough lumber (Keehn, Vol. I, p. 178); and necessarily have an advantage over those who purchase their raw material. But in these pretended cost prices those differences are entirely disregarded. And the price lists distributed among the members, and which they are expected to observe, are not based upon the actual cost of production of any one of the members. Each member fixes his selling price upon a *common* cost of production and not upon *the actual cost to him*; and this within itself is a regulation by combination of the price of flooring, and is a restraint of trade within the meaning of the Antitrust Act.

VI

Book showing estimated freight rates and values of flooring at points of delivery

A further evidence that the members of the defendant association agreed upon and maintained uniform prices is their system of computing freight rates to various points of delivery, and distributing among the members books which not only show such rates, but also contain the prices of lumber delivered at thousands of designated points. In describing the book which was prepared in 1916, the witness Keehn said:

The index letter following the name of each town indicates the rate of freight from Cadillac, Michigan, to the various points. We do not consider that Cadillac is taken exactly as the base. The rate of freight from Cadillac to about thirty or forty or fifty representative markets in the United States happens to be about the same as the average rate of freight from the seventeen producing points in Michigan and Wisconsin. In this particular book it is true that all the freight rates are estimated from Cadillac because we simply took the rate of freight from Cadillac in having it compiled. It shows the rate of freight from Cadillac to five or six thousand points or seven or eight thousand points, scattered all over the United States. (Vol. I, p. 112.)

From the whole of Mr. Keehn's testimony (pp. 112-117) it appears that the following is the method used in computing rates. Nearly all of the factories belonging to the members of the association are

situated in Michigan and Wisconsin. Three mills are located at or near Cadillac, Michigan; and the rates from that point are about the average of the rates from all of the factories to the numerous points in the United States. Therefore Cadillac is fixed as the arbitrary point from which the freight rates are computed. But the rate charged is not always the actual rate from Cadillac to the point of delivery, as Mr. Keehn testified (Vol. I, p. 114) that the rates take a certain grouping, so that the index letters representing 45, for instance, might also represent $44\frac{1}{2}$ or $45\frac{1}{2}$.

That Cadillac has been adopted and used as a common freight basing point is shown by a number of exhibits in the record. In a letter to members dated December 7, 1917, with reference to establishing a uniform custom among the members of the association in respect to the war tax on freight charges, Mr. Keehn said:

As our delivered prices are based upon Cadillac, it would not work out to mention the rate of freight in cents per 100 pounds, because the local rate of freight from points other than Cadillac, to the point of delivery would not be according to our basis used in arriving at delivered prices.
(Vol. IV, p. 433.)

And in a letter dated August 23, 1921, to the Oval Wood Dish Corporation, which had just joined the Association, Mr. Keehn stated:

We are inclosing the following:

"1. Minutes of Meeting of August 19, 1921.

"2. Copy of letter to members dated August 20th, regarding the consensus of opinion as to the current market value of flooring.

"3. Rate Book containing Tables of Values Based upon Average Cost and index to towns showing the delivered values based upon the rate of freight from Cadillac, Mich. Cadillac is our basing point, as it is practically the geographical center of the production and distribution of flooring, and the rates of freight in a general way from Cadillac would be about the average rate of freight from all the Association flooring mills." (Vol. IV, p. 481.)

For some reason, which Mr. Keehn does not explain (Vol. I, pp. 113-114), the rates in the book are given in letters instead of figures, A representing 1, B, 2, etc., down to J, which represents O.

After the rates from Cadillac to the numerous points are thus ascertained, they and the prices of lumber, determined by the method heretofore detailed, are added together, *and the delivered price of lumber at each of the thousands of points mentioned in the rate book is thus obtained and is given by the rate book.*

The system is fully illustrated by reference to Gov. Ex. 35, Vol. III, p. 328, side pages 737-905. This exhibit is the freight rate book which bears date of May 31, 1922, and which was compiled and distributed about that date. Only enough of this exhibit is printed to fully illustrate the character of the book. The first page, after giving the title, contains a

key showing to what figures the letters correspond, and then explains:

To ascertain delivered costs at an unlisted point allow 25 cents for each one cent difference in the rate of freight between the nearest listed point and the unlisted point from point of shipment. (Vol. III, side p. 738.)

Then follows the freight rates, designated in letters, to numerous points in each State, which are computed in the manner above described. For instance, in Illinois the freight rate to Abingdon is BG, or 27 cents; to Annapolis, Maryland, DD, or 44 cents; to Middletown, New York, it is DA, or 41 cents, and to all points in Massachusetts it is DC, or 43 cents. There is then given (side pages 881-882) an Average Cost Chart, which shows the average cost of the three grades and four dimensions of flooring ascertained by the method heretofore described. This chart contains costs of only Maple lumber 13/16" in thickness, but there also appears on side pages 878-879 a Table of Differentials, which shows the difference between the flooring described in the Average Cost Chart and—

- (1) Average cost of Beech, 13/16, All Faces.
- (2) Average cost of Birch, 13/16, All Faces.
- (3) Average cost of Wide Faces.
- (4) Average cost of Thick Flooring.
- (5) Average cost of Jointed Flooring.
- (6) Average cost of Special Grades.
- (7) Average cost of Extra Shorts.

Then follows what is designated as a "Delivered Cost Chart," which contains the delivered costs as above

described of 13/16" flooring of the several faces computed upon every rate given in the freight rate chart. For illustration, take the first item appearing on side page 883, where the freight rate is AE, or 15 cents, the delivered prices for the various dimensions of Clear flooring are: \$88, \$90, \$93, and \$88.50. The delivered prices of No. 1 are: \$71, \$75, \$78, and \$78.50, respectively. The delivered prices of Factory are \$23, \$31, \$33, and \$38.50, respectively; and generally with each advance in freight of one cent, there is 25 cents added to the price, although this does not always hold good. If the manufacturer is shipping other varieties of flooring than maple or other dimensions of maple, he has to make his own computation from the table of differentials described. *Thus there is in the possession of each member the exact price which it is intended that he shall charge at the point of delivery for every shipment made by him.* And not content with this, the book specifies (Vol. III side p. 880) what the terms of sale are to be as follows:

Sixty days net or 2% discount for cash in 15 days, or 1% discount for cash in 30 days from date of invoice after deducting freight.

If the car has not arrived, the discount may be deducted on 90% of the invoice less estimated freight, for cash within proper discount period, the balance with original paid freight bill to be remitted net within 5 days after arrival of car. No cash discount will be allowed after 30 days from date of shipment.

Of course, it would be expensive to have printed and distributed books containing so much matter

every time there is a change in the price. With reference to what is done when a change in price is made, Keehn testifies:

Q. Now, when another estimate of costs has been made before the issuance of another freight-rate book, what did you do?

A. Well, we might have put in a sheet or might have issued a new table of values.

Q. Well, you would do one or the other?

A. One or the other, ordinarily.

Q. That is, you would send to each member a sheet showing this new estimate?

A. New estimate; yes, sir.

Q. So he could use that in connection with his freight-rate book?

A. He could make such use of it as he desired. Simply sent to him for his information. (Vol. I, p. 114.)

The book of 1922 was made up of loose leaves; and direction was printed in the book showing how the old leaves could be removed and new ones inserted (Vol. III, side p. 738).

When this book was issued in 1922, Mr. Keehn, the secretary, sent out to the membership, under date of June 24, 1922, the following letter:

GENTLEMEN: 1. For the information of the members of the Association the Committee on Cost Surveys has made a careful analysis and survey of the Average Cost of Manufacturing and Marketing Maple, Beech and Birch Flooring.

2. The Survey was made in accordance with Article XIV, "Determining Average Cost,"

of the Articles of Association and the results of the Survey are given in the inclosed schedules, which, for brevity, are called "Average Cost Chart" and "Differentials."

3. For the further information of the members, so-called "Delivered Cost Charts" have been compiled. These Charts include the Average Cost of Freight to destination of shipment; in other words, the Average Cost of Freight is added to the Average Cost of the flooring F. O. B. cars at flooring mills to illustrate what the Delivered Cost would be at destination.

4. Copies of the foregoing under date of May 31, 1922, are inclosed herewith.

5. We are also inclosing statement "Survey of Costs" for first quarter of 1922 and an analysis of the "Three Test Runs of 1921" which are also dated as of May 31, 1922.

6. Under the new Articles of Association the new Rate Book will be made up as follows, and will contain only the following matter when completed:

(a) Title Page. As per enclosed copy.

(b) Key to Freight Rates and Index Letters. As per enclosed copy.

(c) Average Freight Rates and Index of Towns. Being the equivalent approximately of the freight rates from Cadillac, Michigan.

Remarks: The freight rates are all being revised to give effect to the reduction ordered by the Interstate Commerce Commission to take effect July 1st.

(d) Average Cost Chart. Showing approximate relative Average Cost of the different

grades and faces of 13/16'' Maple Flooring F. O. B. cars at flooring mills.

(e) Differentials from Average Cost of 13/16'' Maple Flooring.

(f) Delivered Cost Charts 13/16'' Maple Flooring.

(g) Average Cost Chart 3/8'' Maple, Beech and Birch Flooring.

(h) Delivered Cost Chart 3/8'' Maple, Beech and Birch Flooring. (Vol. III, pp. 318-319.)

Apparently the last book issued before the filing of the bill on March 5, 1923, was dated February 15, 1923, and a copy was filed as Gov. Ex. 37, Vol. III, p. 330, side p. 910, et seq., but only enough pages are printed to illustrate its character. This book contains a table of differentials similar to those above described, and also the same directions as to terms of sale. About 7,600 different points are designated therein (Keehn, Vol. I, p. 118). For convenience of inspection the first three sheets of this exhibit are here reproduced as follows:

Differentials

[From Average Cost Charts of Maple 1 1/8'' D. & M.]

FEBRUARY 15, 1923

Average Cost of Beech 1 1/8'' D. & M., all Faces:

Clear—\$10.00 less than Maple.

No. 1—\$5.00 less than Maple.

Factory—Same as Maple.

Average Cost of Birch 1 1/8'' D. & M., all Faces:

Clear—\$10.00 less than Maple.

No. 1—\$5.00 less than Maple.

Factory—Same as Maple.

Average Cost of Wide Faces, D. & M.:

2½" face same as 2¼" face; 3", 3½",
and 4" faces same as 3¼" face, of same
wood, grade, and thickness.

Average Cost of Thick Flooring, D. & M.:

1⅛"—\$5.00 more than ⅝" D. & M.
1⅝"—\$7.00 more than ⅝" D. & M.
1⅞"—\$10.00 more than ⅝" D. & M., of
same wood, grade, and thickness.

Average Cost of Jointed Flooring:

⅝"—\$5.00 more than ⅝" D. & M.
1⅛"—\$10.00 more than ⅝" D. & M.
1⅝"—\$12.00 more than ⅝" D. & M.
1⅞"—\$15.00 more than ⅝" D. & M., of
same wood, grade, and thickness.

Average Cost of Special Grades:

White Clear Maple, ⅝", \$20.00 more
than Clear Maple, ⅝", same face.
Red Clear Beech, ⅝", \$20.00 more than
Clear Beech, ⅝", same face.
Red Clear Birch, ⅝", \$20.00 more than
Clear Birch, ⅝", same face.
White Clear Maple, ⅜", \$15.00 more
than Clear Maple, ⅜", same face.
Red Clear Beech, ⅜", \$15.00 more than
Clear Beech, ⅜", same face.
Red Clear Birch, ⅜", \$15.00 more than
Clear Birch, ⅜", same face.

Average Cost of Extra Shorts:

Clear Maple, Beech or Birch, ⅝" x 2"
or 2¼" Face, under 22", \$35.00 less
than standard lengths of Clear, same
wood and face.

Clear Maple, Beech or Birch, $\frac{13}{16}$ " x $1\frac{1}{2}$ "
Face, under 22", \$40.00 less than
standard lengths of Clear, same wood
and face.

No. 1 Maple, Beech or Birch, $\frac{13}{16}$ " x 2"
or $2\frac{1}{4}$ " Face, under 16", \$40.00 less
than standard lengths of No. 1, same
wood and face.

No. 1 Maple, Beech or Birch, $\frac{13}{16}$ " x $1\frac{1}{2}$ "
Face, under 16", \$40.00 less than
standard lengths of No. 1, same wood
and face.

TERMS OF SALE

Sixty days net or 2% discount for cash in
15 days, or 1% discount for cash in 30 days
from date of invoice after deducting freight.

If the car has not arrived, the discount
may be deducted on 90% of the invoice less
estimated freight, for cash within proper dis-
count period, the balance with original paid
freight bill to be remitted net within 5 days
after arrival of car. No cash discount will be
allowed after 30 days from date of shipment.

AVERAGE COST CHART

*Average Cost of $\frac{13}{16}$ " Maple Flooring F. O. B. cars at Flooring
Mill*

Maple D. & M.	$\frac{13}{16}$ " x $1\frac{1}{2}$ " Face	$\frac{13}{16}$ " x 2" Face	$\frac{13}{16}$ " x $2\frac{1}{4}$ " Face	$\frac{13}{16}$ " x $3\frac{1}{4}$ " Face
F. O. B. Mill:				
Clear.....	\$90.00	\$95.00	\$100.00	\$85.00
No. 1.....	78.00	85.00	90.00	80.00
Factory.....	30.00	40.00	45.00	50.00

DELIVERED COST CHART

*Includes Average Cost of Freight to Destination—Freight Rate,
15 cents to 26 cents*

Freight Rate Index	Maple D. & M.	8" x 1 1/4" Face	8" x 2" Face	8" x 2 3/4" Face	8" x 3 1/4" Face
A. E.....	Clear.....	93.00	98.00	103.00	88.50
	No. 1.....	81.00	88.00	93.00	83.50
	Factory.....	83.00	43.00	48.00	53.50
A. F.....	Clear.....	93.25	98.25	103.25	88.50
	No. 1.....	81.25	88.25	93.25	83.50
	Factory.....	83.25	43.25	48.25	53.50
A. G.....	Clear.....	93.50	98.50	103.50	88.75
	No. 1.....	81.50	88.50	93.50	83.75
	Factory.....	83.50	43.50	48.50	53.75
A. H.....	Clear.....	93.50	98.50	103.50	89.00
	No. 1.....	81.50	88.50	93.50	84.00
	Factory.....	83.50	43.50	48.50	54.00
A. I.....	Clear.....	93.75	98.75	103.75	89.25
	No. 1.....	81.75	88.75	93.75	84.25
	Factory.....	83.75	43.75	48.75	54.25
B. J.....	Clear.....	94.00	99.00	104.00	89.50
	No. 1.....	82.00	89.00	94.00	84.50
	Factory.....	84.00	44.00	49.00	54.50
B. A.....	Clear.....	94.25	99.25	104.25	89.75
	No. 1.....	82.25	89.25	94.25	84.75
	Factory.....	84.25	44.25	49.25	54.75
B. B.....	Clear.....	94.50	99.50	104.50	90.00
	No. 1.....	82.50	89.50	94.50	85.00
	Factory.....	84.50	44.50	49.50	55.00
B. C.....	Clear.....	94.50	99.50	104.50	90.25
	No. 1.....	82.50	89.50	94.50	85.25
	Factory.....	84.50	44.50	49.50	55.25
B. D.....	Clear.....	94.75	99.75	104.75	90.50
	No. 1.....	82.75	89.75	94.75	85.50
	Factory.....	84.75	44.75	49.75	55.50
B. E.....	Clear.....	95.00	100.00	105.00	90.75
	No. 1.....	83.00	90.00	95.00	85.75
	Factory.....	85.00	45.00	50.00	55.75
B. F.....	Clear.....	95.25	100.25	105.25	90.75
	No. 1.....	83.25	90.25	95.25	85.75
	Factory.....	85.25	45.25	50.25	55.75

KEY

Freight Rates..... 1 2 3 4 5 6 7 8 9 0
Index Letters..... A B C D E F G H I J

Mr. Keehn claims that there has been a modification of the information thus sent out after the bill was filed and before the trial, in that the book now in use does not show the delivered cost; that is, the

items of freight and the cost of the manufacturer *are not actually added together*, but both items are contained in the book, and all the shipper has to do is to make the addition. As said by the court, "In other words, instead of having a four, he (the manufacturer) has two and two." (Vol. I, p. 118.)

Keehn also claims that the rate book or tables do not now include the differentials and terms of sale. (Vol. I, p. 153.) But he admits that the terms of sale prescribed have generally prevailed in the lumber industry (Vol. I, p. 155), and the differentials as to 70% or 80% of the business are shown in the reports sent to the members (Vol. I, p. 177). And it is not claimed that the association has ceased sending out the so-called cost prices, which show the differentials between the different dimensions of male flooring, which represents 90% of the business. (Keehn, Vol. I, p. 131.)

Special attention is called to the fact that in the books issued in 1922 and 1923 the tables of delivered prices are designated as "Delivered Cost Chart." Prior to that time these tables had been designated "Table of Values." See Table issued January 6, 1921 (Ex. 34, Vol. III, p. 322, side p. 554, et seq.). In this book, after the "Concessions and Additions—Tables of Values January 6, 1921," appears the statement "*Established* for First Quarter, 1921." (Side p. 694.) These words were used advisedly, and refer to the values, terms, etc., "*established*" under the minimum-price plan and the minimum-price basis. It was

under those plans that the delivered prices were *fixed*; and they were therefore designated as "*values*" and not "*costs*". Apparently in these charts, the delivered prices were not designated as "*values*" before 1916, the date when the minimum price plan originated. On p. 320, side pp. 419 and 420, appears a number of pages of a book dated May 21, 1913, which is improperly designated as "Gov. Exhibit 26," but which is probably a part of Gov. Exhibit 30 f. They show delivered prices, but are not designated "Table of Values," as appears in the table issued May 15, 1916. (Side pp. 513, 514-521.)

A method of determining the freight rate which the members have included in the price of flooring has been in existence ever since the first association was organized in 1905. Mr. Keehn says, "I was connected with the association on April 1, 1905. I am very familiar with this paper 'Prices on Maple Flooring, effective April 1, 1905,' " and that the paper was a table of prices on maple flooring by geographical zones. (Vol. I, p. 111.) The document spoken of is filed as Gov. Ex. 29. (Vol. III, p. 320, side p. 408, but improperly numbered 498.) That was a simple document as compared with subsequent tables; but it showed the prices which were expected to be charged for lumber delivered at various points in the United States. Some specific points were mentioned, but generally a specified delivered price applied to all, or the greater portion of a state. It appears, however, that by 1911, a table of the nature of those used in recent years and now in use had been devel-

oped. (See Gov. Ex. 30E, Vol. III, p. 320, side p. 417.) And in 1913 the system had about reached perfection. (Gov. Ex. 30f [not 26] Vol. III, p. 320, side pp. 418, 419.)

In order for those producing and selling an article to observe uniform prices, or a minimum price, and thus avoid competition, it is essential that some method be devised whereby they can easily ascertain what the delivered prices of the article are at the various points to which the commodity is shipped.

Different methods have been devised, but this court has so far had presented to it no method so complete in all of its details as the one adopted by this association. Here in most instances no computation was left to be made by the manufacturer; and all he had to do was to turn to his book and find the point to which the shipment was destined, and he had the price before him.

If it was not intended by the members that the prices of lumber should be controlled or in some way affected by this organization, why was each member furnished with a list of fixed or designated prices? To say that these elaborate calculations and their distribution among the members were not intended to have, and did not have, any effect upon the prices charged by the members is to disregard absolutely every element of common sense in determining facts.

VII

Statistics

In the Articles of Association in existence from January 1, 1913, to January 1, 1919, the article relating to reports provided that reports should be made by each member to the secretary at the close of business each day of all deliveries and shipment of all kinds of maple, beech, and birch flooring within the United States except flooring purchased from members of the association; and the secretary was given authority to examine the books and papers of the members to verify statements; and it was also required that a sworn statement showing total deliveries and shipments for each month should be rendered on or before the fifth of the following month (Vol. III, p. 7); but there was no provision made for the distribution of statistics by the secretary among the members of the association. The articles which were in existence for the first three months in 1919 had a similar provision (Vol. III, pp. 20-21). The articles relating to statistical reports in the Articles of Association which went into effect January 1, 1922, and continued until January 1, 1925 (Vol. III, p. 64), have heretofore been copied in full (p. 8); and, briefly stated, they provide that each member shall report monthly on or before the fifth day of each month (a) stocks on hand of the three varieties of flooring; (b) unfilled orders; (c) amount in feet of shipments made during the preceding month within the United States except purchases made from other

members; (d) production for previous month; (e) new orders booked during month; and (f) average prices f. o. b. flooring plant for 13/16" x 2 1/4" Clear, No. 1 and Factory; and that each member shall report promptly at the end of each week all sales made during the week of the three varieties of flooring, the reports stating quantity, kind, and grade of flooring sold, the delivered price sold at, the average freight rate to destination, and the commission paid, if any; and that all the statistical reports shall relate solely and entirely to past and completed transactions and shall be mailed "by the members to the Secretary, *who shall report the same to the members.*" (Vol. III, p. 70.)

Monthly statistical reports of stocks on hand, of unfilled orders, of shipments, of production, and of average prices realized have apparently been made by the association to its members at least since January, 1912. (Government Exhibit No. 40, Vol. III, side pages 956-960.) The earliest such report printed in the record is dated January 18, 1913. (Gov. Ex. 40A, Vol. III, side pages 1003-1009.) This report gives practically the same bare statistical information as does the report dated April 17, 1923, which is fully described below (p. 97), but it does not give the information in as great detail as does the later report, nor does it contain any of the elaborate comparisons in percentages and by the graphic representation, called a barometer, which the later report makes between the current statistics and those for earlier months and years.

With the exception of a few months during 1914 and during 1916, when an exchange of quotations was operated through the association (Vol. III, pp. 209 and 227, and Vol. IV, p. 430), no detailed reports of actual prices were furnished the members by the association until the weekly sales reports were started in 1920. During this period the only reports of actual prices were the monthly reports of average prices f. o. b. cars at the factory of $1\frac{3}{8}$ " x $2\frac{1}{4}$ " face maple flooring. Specimens of these reports, then called Current Net Values, dated January 18, 1913, October 28, 1913, and September 19, 1916, are printed in the record. (Vol. III, side pages 1004, 2130, and 1322.) The earliest of these reports merely gives the average price realized for five groups of mills and the general average, but the later reports are in the same form as the report of Average Prices Realized, dated April 17, 1923, which is described below (p. 98).

Mr. Keehn says that he doesn't recall exactly when the weekly reports of sales were started, but that it may have been some time in 1920. (Vol. I, pp. 176-7.) The minutes of the annual meeting held February 12, 1920, establish definitely, however, that the collection and distribution of weekly reports of sales were authorized at that meeting. The pertinent portion of those minutes reads as follows:

Weekly Sales Reports.—In view of the extraordinary business conditions now existing, it was the sense of the meeting that weekly reports of sales should be made in order that

the members of the Association may have as much information as possible regarding current market conditions.

On motion the following resolution was adopted by unanimous vote:

"Resolved, 1. That the members make reports to the Secretary on Saturday of each week, giving a complete record of all sales made during that week of one carload or more of Maple, Beech, or Birch Flooring, the reports to give date of sale, quantity sold (if one carload or more), the thickness, face, grade and wood, the delivered prices sold at, and the Rate Book index letters to indicate destination, but the names of towns to be omitted.

"2. The information contained in the reports to be tabulated by the Secretary and exchanged by him among the members only who make the reports." (Vol. IV, p. 528.)

The earliest weekly sales report secured under subpoena and introduced as evidence is dated March 2, 1920, but it indicates that similar reports had been issued for at least several weeks preceding that date. (Vol. III, pp. 356-359.)

Because of the decision in the United States District Court at Memphis in the Hardwood Case, on advice of counsel the entire reporting system was suspended from April 1, 1920, to August 1920. (Vol. I, pp. 146-7.) The weekly sales reports were also omitted for a few weeks in December, 1921, and January, 1922, because of the decision of the Supreme Court in the same case. (Vol. III, p. 152.) The Government filed as exhibits statistical reports which cover

practically the entire period from 1913 to 1923, and weekly sales reports which cover practically every week of the period from January, 1921, to October, 1923, but has had printed only a sufficient number to fully illustrate the entire reporting system from its inauguration down to the present time. As we are now especially concerned with the manner of reporting at the time the original bill was filed, we call special attention only to such reports as illustrate the system then in use, and also to one or two reports made since the filing of the bill which indicate a slight change which Mr. Keehn claims has been made in the system since the institution of the suit.

Government Exhibits 44 to 48, inclusive (Vol. III, p. 404, side pp. 2852-2858), are forms for individual reports to be made by members to the secretary of the association. The first form (Exhibit 44) is for a report showing (1) date, (2) quantity, (3) thickness and face, (4) grade, (5) wood, (6) delivered price at which sold, (7) average freight rate to destination, and (8) rate of commission paid, if any, as to each shipment, and at the bottom the member is asked to report every Saturday, and if no sale has been made during the week, to send the blank in with such notation. (Vol. III, side p. 2852.) Government Exhibit 45 is a form for reporting the average prices realized f. o. b. plant for $\frac{1}{4}$ x $2\frac{1}{4}$ " face Clear, No. 1 and Factory maple flooring, and it shows the number of feet, the delivered price, the quantity, and freight to destination of each grade (side p. 2853). Exhibit 46 is a form showing (1)

maple flooring on hand of each dimension and grade and (2) the unfilled orders on hand of each dimension and grade (side p. 2854). Exhibit 46A gives similar information with reference to beech flooring, and Exhibit 46B the same with reference to birch flooring (side pp. 2855 and 2856). Exhibit 47 is the form of a report showing the amount of production of each grade and new orders booked for each variety of flooring, and Exhibit 48 is a summary of shipments showing quantity of each variety shipped (side pp. 2857 and 2858). Exhibit 44 is a weekly report, while the remainder are reports made at the end of each month.

From the information obtained by these reports the secretary compiles the information which he sends out to the various members.

Government Exhibit 43-FFF (Vol. III, pp. 377-384) is the report of all sales made by every member during the week ending April 1, 1922. As heretofore shown, this was sent out to each member about the middle of the following week. It is dated April 6, 1922. This report shows the date of each sale, the exact quantity of each dimension and grade, the delivered price, the Cadillac freight rate, the commission allowed, if any, and the member by which the sale was made, the member being indicated by its identification number. Government Exhibit 43-ZZZZZ (Vol. III, p. 390) is the report for the week ending July 14, 1923. It was made nearly four and a half months after the bill was filed, and is in precisely the same form as the one made at the end of

April 1, 1922. But Mr. Keehn says that at the meeting held July 19, 1923, the form of this weekly report was so changed that it no longer identifies the particular mill reporting each sale. Government Exhibit 43-AAAAAA (Vol. III, pp. 398-402), the report distributed among the members for the week ending July 21, 1923, which is the first report made after the alleged change, contains exactly the same information as the previous reports except that the number of the member reporting each sale is omitted, but in this report the groups of mills are designated so as to show that the first ten sales were made by members of eastern lower Michigan mills, that the next eight sales were made by the western lower Michigan mills, and the remaining seven were made by the upper Michigan and Wisconsin mills.

It appears from defendants' exhibit G I (Vol IV, side pp. 5340-5342), a weekly sales report dated November 9, 1923, that other changes in the form of the report were made between July 27, 1923, and that date, as the later report has a different grouping system, which is described below (p. —), and also the July, 1923, reports have the following additional information appended, which does not appear in the report dated April 6, 1922:

Averages of Sales Week Ended November 3, 1923

	Clear	No. 1	Factory
H x 2¼" face Clear, No. 1 and Factory Maple Flooring, Standard Grades and Lengths:			
Averages of Delivered Prices.....	\$98.62	\$87.57	\$52.58
Averages of Average Freight Rates.....	.29	.26	.32
Average Cost of Freight.....	5.80	5.20	6.40
Averages of Prices Realized F. O. B. Flooring Mill Basis.....	92.82	82.37	46.18

Total Sales of $1\frac{1}{8} \times 2\frac{1}{4}$ " Face Maple Flooring

Clear.....	620 M feet.
No. 1.....	416 " "
Factory.....	260 " "
Total.....	1,296 " "

(Vol. IV, side page 5342.)

In fact the reports had formerly separated the sales according to the geographical groups of members. The sales reports dated March 2, March 16, and April 20, 1920 (Vol. III, pp. 356-367), separate the sales made according to the groups of the members, but do not show the individual member making each sale. The reports dated January 13, January 20, January 27, 1921 (Vol. III, pp. 261-276), and October 6, 1921 (Vol. III, side pp. 2394-2396), give the identification number of the member making each sale and also separate the members according to groups, although in the last-mentioned report the separation into groups is only indicated by lines across the report. The small volume entitled "Additional Exhibits" contains weekly reports distributed by the secretary beginning with the week ending March 4, 1922 (p. 1), and continuing to the report dated February 24, 1923 (p. 41), although reports are not printed for all the weeks. In the first of these reports the mills were divided into groups, but in the report for the week ending May 20, 1922, and in the succeeding reports they are not so divided. Manifestly the resumption of this division after it had been determined to omit the number of the member reporting was to enable the members to

identify as nearly as possible the members by whom the sales were made.

That this may be done with considerable certainty is manifest from an analysis of the manner in which the sales reports are prepared. The following table shows that a definite and unvaried sequence was used prior to July, 1923, in reporting the sales made by the different members.

Analysis of order in which identification numbers appear on sales reports

Apr. 5, 1922, Vol. III, p. 377	May 24, 1922, Add. Ex.	June 8, 1922, Add. Ex.	June 21, 1922, Add. Ex.	Oct. 4, 1922, Add. Ex.	Oct. 21, 1922, Add. Ex.	Nov. 4, 1922, Add. Ex.	Dec. 7, 1922, Add. Ex.	Feb. 6, 1923, Add. Ex.	Mar. 1, 1923, Add. Ex.	Mar. 21, 1923, Add. Ex.	July 10, 1923, Vol. III, p. 300
2	2	2	2	2	2	2	2	2	2	2	2
24	24	24	24	24	24	24	24	24	24	24	24
33	33	33	33	33	33	33	33	33	33	33	33
49	49	49	49	49	49	49	49	49	49	49	49
3	3	3	3	3	3	3	3	3	3	3	3
8	8	8	8	8	8	8	8	8	8	8	8
14	14	14	14	14	14	14	14	14	14	14	14
26	26	26	26	26	26	26	26	26	26	26	26
30	30	30	30	30	30	30	30	30	30	30	30
37	37	37	37	37	37	37	37	37	37	37	37
47	47	47	47	47	47	47	47	47	47	47	47
7	7	7	7	7	7	7	7	7	7	7	7
23	23	23	23	23	23	23	23	23	23	23	23
34	34	34	34	34	34	34	34	34	34	34	34
42	42	42	42	42	42	42	42	42	42	42	42
44	44	44	44	44	44	44	44	44	44	44	44
45	45	45	45	45	45	45	45	45	45	45	45
50	50	50	50	50	50	50	50	50	50	50	50
22	22	22	22	22	22	22	22	22	22	22	22
48	48	48	48	48	48	48	48	48	48	48	48
51	51	51	51	51	51	51	51	51	51	51	51

A comparison of this table with the reports such as the "Record of Average Prices Realized" dated April 17, 1923 (Vol. III, side p. 2051), and the "Record of Completed Transactions" dated October

6, 1921 (Vol. III, side pp. 2401-2405), in which the individual identification numbers are given under the several groups, shows that this sequence in reporting has always followed the group system even when the groups were not otherwise designated, and has always given the reports for the members in each group in the numerical sequence of their identification numbers. The several groups have therefore been indicated by the lines across the above table. Until some time after July, 1923, the several groups and the numbers of the members in each group were as follows:

Grouping prior to July, 1923

Eastern lower Michigan mills	Western lower Michigan mills	Upper Michigan and Wis- consin mills
2	3	4
24	5	7
33	14	¹ 23
49	26	¹ 34
	30	42
	37	44
	47	¹ 45
		¹ 50

¹ Wisconsin.

One of the pages of the Monthly Barometer Report for September, 1923, dated October 19, 1923 (Vol. III, side p. 2863), shows that after the use of the identification numbers was abandoned, the Upper Michigan mills and the Wisconsin mills were placed in separate groups, and another page of the same report gives in a footnote the following explana-

tion of the present grouping system (Vol. III, side p. 2866):

Group 1. Eastern Lower Michigan Mills.....	4
2. Western Lower Michigan Mills.....	6
3. Upper Michigan Mills.....	4
4. Wisconsin Mills.....	4
5. Chicago, St. Paul, Tupper Lake Mills.....	3
Total Mills.....	21

The record does not contain any statement as to the present grouping of the members, but it appears quite obvious that No. 47, William Horner, with a plant at Reed City in the Upper Peninsula of Michigan, has been transferred to the Upper Michigan group, and that the members constituting each group are now as follows:

Grouping after July, 1923

Eastern Lower Michigan Mills	Western Lower Michigan Mills	Upper Michigan Mills	Wiscon- sin Mills	St. Paul Chicago Tupper Lake
2	3	7	23	22
24	5	42	34	48
33	14	44	45	51
49	26	47	50	
	30			
	37			

It is only necessary to assume that the same reporting sequence has been followed since July, 1923, to ascribe with absolute certainty the figures as to average prices realized as given by the report dated October 19, 1923 (Vol. III, side p. 2863), to the several members of the association. A footnote to this report states that No. 3, which according to the sequence should appear first in Group 2, made no sales, and that no reports were received from Nos. 23, 37,

and 45, which according to the sequence should appear, respectively, last in Group 2 and first and third in Group 4. Any member of the association could therefore readily complete this report so as to make it read in part as follows:

Range of average prices realized F. O. B. Michigan and Wisconsin Flooring Mills in September, 1923, for New Orders Booked for 11' x 2 1/4" Clear, No. 1 and Factory Maple Flooring, Standard Grades and Lengths, after deducting Freight

Group 1—Eastern Lower Michigan Mills:		Clear September
2.....		\$95. 00
24.....		96. 42
33.....		100. 33
39.....		101. 15
Average.....		98. 23
Group 2—Western Lower Michigan Mills:		
3.....		No sales.
5.....		93. 73
14.....		94. 89
26.....		95. 01
30.....		95. 91
37.....		No report.
Average.....		94. 89
Group 3—Upper Michigan Mills:		
7.....		96. 40
42.....		97. 85
44.....		98. 14
47.....		102. 18
Average.....		98. 64
Group 4—Wisconsin Mills:		
23.....		No report.
34.....		97. 17
45.....		No report.
50.....		102. 36
Average.....		99. 77
All Michigan and Wisconsin Mills, average.....		97. 61
Includes reports from 14 Members.		
OCTOBER 19, 1923.		

Under these circumstances the additional statement in the footnote to this report of Average Prices Realized that "Reports of Nos. 48, 22, and 51 omitted to

avoid disclosing their identity" appears to be a magnificent gesture but to mean nothing.

The individual sales appearing on the weekly sales reports as now made up can not always be attributed with mathematical certainty to the several members of the association. Nevertheless, the creation of a separate group for the Wisconsin mills so that one group only includes three mills, three groupes only include four mills apeice, and the other group only includes six mills, must render it comparatively easy for any person well acquainted with the industry to determine with reasonable accuracy which member has made each sale reported. A weekly sales report dated November 9, 1923, is printed in the record. (Vol. IV, side pp. 5340-5342.) It shows for the week ending November 3, 1923, that group 1, the Eastern Lower Michigan Mills, made ten sales divided among the four members of the group; that group 2, the Western Lower Michigan Mills, made fifteen sales divided among five members of the group—No. 37 having made no report; that group 3, the Upper Michigan Mills, made fifteen sales divided among the four members of the group; that group 4, *the Wisconsin mills, made four sales divided among three members of the group*, No. 23 having made no report; and that group 5, *the St. Paul, Chicago and Tupper Lake mills made two sales divided among two members of the group*, No. 22, the St. Paul mill, having made no report. At least the first and last sales in each group can be definitely ascribed to the first and last reporting members of the group, and

there can be very little doubt as to which member made every sale in some of the groups, as *an inspection of the report indicates that it is the present practice to report all sales made by each member in the numerical sequence on their order dates, so that a change from a late to an earlier date indicates a change in the reporting member.*

The monthly reports are illustrated by Government Exhibit 40-5R, Vol. III, p. 350, side pp. 2049-2059. The first page is entitled "Stock Conditions and Barometer for March, 1923," and is dated April 17, 1923. It gives a complete analysis of current market conditions. The first table on the page gives the percentage sold of the available stock of each of the three varieties of flooring and of each grade of each of the three varieties as of March 31, 1923, March 1, 1923, and March 31, 1922, and the second table gives the increases in the percentages sold (stated as "points up") of the three varieties of flooring, of maple flooring, and of maple 2¼" flooring as compared with the same day the preceding month and with the same date the preceding year. Under these tables is a column of statistics as to stocks on hand, unfilled orders, shipments, production, and new orders booked, as of March 31, 1922, and March 31, 1923, and as to each the increase or decrease as of the latter date stated both in actual amounts and in percentages. At the bottom of the page is a comparison of the average values of 13/16" x 2¼" face Clear, No. 1 and Factory Maple Flooring for March,

1922, and March, 1923, and the increase as of the latter date stated both in dollars and in percentage. On the right-hand side of the page are seven columns which illustrate the stocks and unfilled orders on hand March 31, 1923, and the shipments, the production, the new orders booked and the average values for March, 1923, compared with March, 1922, as the measure.

The second page of this exhibit shows the following data as to each member individually for March, 1922, and March, 1923, to wit: "Stocks on Hand," "Unfilled Orders," "Shipments," "Production," "New Orders," and "Stock Changes," showing the increases and decreases. The third page is a record of the average prices realized f. o. b. flooring mills for new orders booked for $1\frac{3}{8}$ " x $2\frac{1}{4}$ " Clear, No. 1 and Factory maple flooring, standard grades and lengths, after deducting freight, the members there appearing in groups and the average price being given for each member and for each group. On the next page appears, first, "Shipments of each wood March, 1922-1923," showing the increase, both actually and in percentage; second, "Production by Grades" of each variety of flooring and for all three varieties for the years 1916 and 1922; and, third, the average prices realized f. o. b. Michigān and Wisconsin mills for $1\frac{3}{8}$ " x $2\frac{1}{4}$ " face maple flooring, after deducting freights and commissions, for each of the three grades and for the product for March of each year 1916-1923, and the averages for that period, and also for March, 1923, and compares the figures for March of

each later year, with March, 1916, as 100% (side p. 2052). The next page shows, first, flooring of each grade and dimension, all varieties, on hand March 31, 1923, and, second, unfilled orders on hand March 31, 1923, for each grade and dimension (side p. 2053).

Side page 2054 shows, first, maple flooring of each grade and dimension on hand March 31, 1923, and second, unfilled orders for maple on hand March 31, 1923. Side page 2055 shows the surplus maple flooring stock on March 31, 1923, of each grade and dimension. By "surplus" is meant an excess of 100,000 feet. Page 2056 shows maple flooring surplus in M feet March 31, 1923, and also the "Summary of Surpluses." Page 2057 shows, first, beech flooring on hand March 31, 1923, giving each grade and dimension, and second, unfilled orders for beech on hand. Page 2058 gives the same information with reference to birch flooring, and page 2059 is a record of the receipt of March, 1923, reports, and shows the date of the receipt of each report as to stocks and unfilled orders, shipments, production, and new orders, and average prices realized. Monthly reports for other dates are printed, but a study of those cited as Exhibit 40-YYY, p. 346, side p. 1620-1629, which is for May 17, 1919, shows that there is no substantial difference in their contents.

Exhibits 40 and 41-2 U (Vol. III, side pages 991-996 and 2107-2108) are respectively the Annual Statistical Report for the year 1921, dated February

17, 1922, and the Semi-Annual Statistical Report for the first half 1923, dated July 14, 1923. It is not necessary to describe these reports in detail as they are in the same general form as the monthly report. Briefly stated, they summarize and consolidate the monthly statistics and compare the totals and the averages for the half year and the year with the statistics for the first half of the preceding year and with the preceding year.

An analysis of the reporting system clearly shows that there is no information withheld by one member from another, and that everyone is perfectly familiar not only with summaries which show the market conditions generally but also with the exact condition of the business of each of his fellow members.

The reporting system here in effect is more complete in its details than that used by the Hardwood Association, which organization was held to be illegal in *American Column & Lumber Company v. United States*, 257 U. S. 377.

The importance that is attached by the members to the information contained in these reports is not a matter of conjecture or inference as the witnesses in this case have testified with a considerable degree of frankness upon the subject. This will appear from the following citations and quotations from the evidence of a number of the witnesses:

J. L. Colby, of Cummer-Diggens Company, after being cross-examined at length upon the subject (Vol. I, pp. 215-218), on re-examination says: "I don't want to give anyone the impression that we

don't pay any attention to the statistics distributed by the association. I do want to state that the statistics are not the primary consideration with us" (pp. 221-2); and to the question "Why is that price always exchanged between you members if it is not worth anything?" he answered, "It is a matter of statistical information, some members might consider it worth more than others. I assume that the member can consider it or not just as he likes when he gets it" (Vol. I, p. 224). This witness probably was the least willing of all the witnesses to admit the manifest use of the statistics made by the members.

Mr. McLurg, of Kneeland-McLurg Lumber Company, testified as follows:

Q. You say, Mr. McLurg, that you consider those statistics when you go to make up prices?

A. Yes, sir.

Q. Are you the sales manager?

A. No, sir.

Q. You consider them pretty carefully, don't you?

A. I don't. My sales manager watches them. I pay very little attention to the selling.

Q. You examine and consider those weekly sales reports?

A. He does; yes, sir.

Q. And they show the prices?

A. Yes, sir.

Q. At which the sales were made?

A. Yes, sir.

Q. And you regard that as of value?

A. *Very valuable.*

Q. And you also regard it as very valuable, the reports as to production?

A. Not so much production as I do stocks on hand.

Q. Stocks on hand.

A. I don't care so much about production as I do with what they have on hand.

Q. Why is that valuable if it does not enter into the making of the price?

A. *I said it did enter into my making the price.*

Q. If those statistics showed that those competitors were getting a good, big, high price, why, you follow, don't you?

A. If our stocks are such that we can, and if they are low, we buy from them, try to find out who it is and buy some stock.

Q. But if they get a good high price you follow, don't you?

A. We try to get all we can; yes, sir.

Q. Well, you follow them?

A. We don't follow that as a lead.

Q. If they get a higher price than you do, you try to follow them, don't you?

A. Try to get all we can for our stock.

Q. Mr. McLurg, if they are selling higher than you are, you try to follow them, don't you?

A. Yes, sir. (Vol. I, pp. 229-230.)

Mr. DeWitt, of Holt Hardwood Company, when asked on examination in chief what the advantages of being a member of this association were, said:

Well, one of the big advantages is the statistical reports that we get; it enables us to find out

what the market is doing, and as I testified before on that, then we can put the proper grade of lumber into our mills to produce the grade of flooring that is demanded by the market, and it is not only an advantage to the manufacturers but it is also an advantage to the consumer. If we did not do that there would be times when there would be a great shortage of some particular kind of flooring, naturally the price of that would be high and the consumer would suffer, but from the fact that we have that information it gives us a chance to keep our stock pretty well balanced with the requirements of the market; *also that same report gives us the prices being obtained by other members of the association, although that information is generally about two weeks old when we get it, it is valuable to us.* The standardization has been a very valuable thing. (Vol. I, p. 252.)

And on cross-examination this witness said:

Q. And that is the very reason you take those statistics, isn't it; you want to know what your competitors are getting for their lumber?

A. That was one of the reasons.

Q. Well, that is your main reason, isn't it?

A. No; the other parts of the statistics is also very valuable to us as I have already testified.

Q. It is all valuable.

A. It is all valuable, that part too.

Q. When you go to make your price you consider all those statistics, don't you?

A. Yes, sir.

Q. And you fix the price very considerably by what you learn from these statistics, don't you?

A. That is one of our sources of information.

Q. An important one, isn't it?

A. Important one; yes. (Vol. I, p. 257.)

Mr. Shepeck, of I. Stephenson Company, Trustees, on examination testified:

The statistics issued by the Association are a big benefit to us. The information that we gather from these statistics as to stocks on hand, production, new orders booked, also the weekly sales reports, are of considerable benefit to us. They enable us to form an opinion as to what the conditions are and assist us in intelligently handling our flooring business.

Q. How do you handle your flooring business, whether you consider present prices or future prices, or both?

A. We are concerned with both. (Vol. I, p. 264.)

And on cross-examination he testified:

Q. Isn't your dollars and cents in the price which you are able to make on account of these statistics, there are your dollars and cents?

A. Sometimes the statistics cost us money, in order to get out.

Q. How do you lose money out of these statistics?

A. I feel pretty good sometimes, until the statistics come along, and then I feel sick and cut my price.

Q. If you didn't get the sickness you might have to cut more; sickness helps you in that case. If it wasn't for the statistics you wouldn't belong to that Association right now?

A. *No; I don't think we would; we might.*
(Vol. I, p. 266.)

And again:

Q. But anyway, you do say that these statistics showing demand and supply and stocks on hand and all those things, and prices paid, are of very great value to you?

A. Yes, sir.

Q. And, of course, that means that they are of great value to you in that they enable you to get more money out of your lumber?

A. Not necessarily; no, sir.

Q. Isn't that what you are striving for, to get more money for your lumber?

A. To a certain extent; yes, sir.

Q. Would you be in business if it was not for the money you get out of it?

A. No, sir.

Q. You are striving for profits?

A. Yes, sir.

Q. And that is all you are striving for, profits?

A. Oh, not entirely; no.

Q. You are not doing it for exercise, are you?

A. No.

Q. Or amusement; you could get amusement somewhere else?

A. I get amusement out of my business.

Q. You are just the same as other men in business; you are in business to make money out of it?

A. Yes, sir.

Q. And the thing that is valuable to you is that which enables you to make more money?

A. It enables us to keep from going broke.

Q. That is the same thing?

A. Yes; to a certain extent.

Q. That is, it keeps you from losing money?

A. Yes, sir. (Vol. I, p. 267.)

Mr. Hodges, of the Oval Wood Dish Corporation of Tupper Lake, New York, who is the only member in or near that locality, testified in chief:

I think the statistics that are furnished our Company by the Secretary of the Maple Flooring Manufacturers' Association are very valuable.

The weekly reports are valuable as showing a trend of the market, whether the prices are going up or going down and another valuable feature is the amount of sales, that enable us to know approximately how much of each grade, for instance, has been sold within a certain time.

Q. Do you regard the prices there more or less important than the statistics with regard to volume?

A. I think the statistics in respect to volume are fully as valuable as the price statistics, because oftentimes it does not matter to me what somebody in Michigan is getting in prices; if I know my competitor who lives eleven miles from me is getting two dollars less than my

figures show, that would influence me more than what I might see in the sale reports. (Vol. I, p. 291.)

And again:

Well in the first place I think I would take into consideration the economic situation, that is, the general trend of the market, whether it was up or down, and then I would take into consideration my own particular stock conditions. If I had a surplus of some one item and wanted it moved, why I would be apt to make a lower price, *particularly if I saw that some one else was making a lower price on that same item.* On the other hand, if the general trend of the market was upward and I had no accumulation of that stock *and I saw somebody was getting more money than I was, it may tend to influence me to raise my prices.* (Vol. I, p. 292.)

And—

The mere fact that some one else was charging higher prices or lower prices than I had been would not automatically cause me to lower or increase my prices. I would consider my own stock and the other conditions above mentioned. The fact that some one else was charging higher or lower prices than I was would be considered as one factor and would be given consideration by me. (Vol. I, p. 293.)

On cross-examination this witness said:

Q. Now, in regard to those statistics, didn't you join this Association very largely to get the information that is contained in those statistics?

A. Yes, sir.

Q. Don't you use it all the time?

A. What do you refer to?

Q. I mean all the statistics; don't you use them all?

A. Why, yes; certainly.

Q. Aren't you studying them continually with reference to your changing prices?

A. I wouldn't say that; but we do study them; we look them over whenever we get them and take them into account. *That is one of the factors that determine our price.*

Q. If it wasn't for those statistics you wouldn't belong to the Association, would you?

A. *I don't think so; it would be of no value to us.* (Vol. I, p. 300.)

Mr. Ralston, formerly Sales Manager for the Receiver of William Horner, in chief testified:

A. The Statistics, as a rule, *are very, very, valuable*, especially as regards the production and the stocks on hand and the general information given in these statistics that we received from time to time. (Vol. I, p. 324.)

And on cross-examination he testified as follows:

Q. You said these statistics that you get from the Association you regard as very valuable?

A. In the main; yes. -

Q. And you emphasized the "very"—as a matter of fact, you repeated it. You regard that as one of the most valuable activities in which the Association engaged; don't you?

A. The statistics?

Q. Yes.

A. Yes; as to costs and production, and etc.

Q. Taking statistics as a whole, regardless of prices and production?

A. I said before that there are some features of those statistics that I don't regard of any value at all, and never did.

Q. And there are some other features that are more valuable than other features?

A. Absolutely.

Q. And of course those statistics are valuable in that they aid you in getting more money for your lumber?

A. For our flooring?

Q. More money for your flooring?

A. Some cases, and some cases the opposite.

Q. If it didn't aid you in getting more money for your flooring, they wouldn't be of any value, would they?

A. There is something in that; true.

Q. Isn't that absolutely true?

A. Not always. (Vol. I, pp. 329-330.)

Mr. Klesner, the representative of the receiver for William Horner, testified as follows on cross-examination:

Q. If you were selling at 90 and they were selling at 95, and you got the information through that report of the fact that they were selling at 95, you would go up to 95 at once, wouldn't you, or you will go at least to 94?

A. Well, possibly.

Q. Well, wouldn't you do it, isn't that common sense?

A. Yes; that is common sense.

Q. Why, of course, and that is the way you run your business, isn't it?

Q. I will tell you, as I say, we pay very little attention to the report; we are simply governed by the market conditions, the price for lumber, the cost of manufacture, we try to get as near that price as we can, but if we can't get our price and we have to meet legitimate competition, naturally we do it if we need the business.

Q. When you speak of market conditions the price is a part of the market condition?

A. Yes, sir.

Q. And the price revealed in those statistics is a part of the market conditions, isn't it?

A. Yes, sir.

Q. And the stock on hand is a part of the market conditions; that is true, isn't it?

A. Yes, sir.

Q. That is, the stock that belongs to everybody else and the stock that you have got is a part of your market conditions?

A. Yes, sir.

Q. And you are controlled by all of those things; as a matter of fact, you are controlled by the stock on hand and the price at which the flooring is moved—that is the fact, isn't it?

A. That is the fact.

Q. And all those things are revealed by those statistics, aren't they?

A. Yes, sir. (Vol. I, p. 338.)

Mr. Greene, of the West Michigan Flooring Company, after a lengthy cross-examination upon the subject, said:

Q. Let us see about working both ways. As a matter of fact you always want to get all you can for your lumber?

A. We are in the business for that purpose.

Q. And now after you get those reports, and those reports show, say, that you are selling at 95 and that your competitors are selling at 90, just as long as you can get 95 you will get it, won't you?

A. I presume I would; yes, sir.

Q. Yes; of course you will; never come down until you have to, of course.

A. But it is fair to say——

Q. Is that true?

A. I come down to meet market conditions.

Q. You never come down until you have to, until pressure is brought to bear on you from the demand; isn't that true?

A. That is usually immediately; yes, sir.

Q. Whether it is usually immediately or not, just as long as you can get your 95 you are going to get it, aren't you?

A. Yes, sir.

Q. But if you examine those reports and you are selling at 90, and they are selling at 95, you immediately are going to get your 95 if you possibly can, aren't you?

A. Not necessarily, if my stock condition does not warrant it.

Q. Not necessarily, but you are going to get it if you can, aren't you?

A. Within a period of time; yes, sir.

Q. Just as quick as you can?

A. I presume so.

Q. Don't you know? You run your business that way to get all the money you can out of it?

A. Yes, sir. (Vol. I, p. 391.)

Mr. Dewey, of Bigelow-Cooper Company, described his use of the statistics as follows:

I analyze the statistics that are furnished us from time to time by the Secretary of the Association so as to get as intelligent an idea as possible of the condition of the industry. These statistics throw a great deal of light on that subject. I use the statistics in the same way as I use other information regarding general conditions. I prefer light rather than darkness, so far as business conditions and the conditions of the industry are concerned. (Vol. I, p. 397.)

The exhibits introduced in evidence by the government also contain many statements showing the great value and importance attached by the members to the information contained in the statistics, and especially in the price statistics, furnished to them by the association. As stated heretofore, no detailed reports of sales were furnished to the members until March, 1920, and the statements made prior to that date with reference to the current net-values reports, which were monthly reports of average net prices f. o. b. mills and to their effect in stabilizing, maintaining, and increasing prices, must be much more applicable to the effect of the present

detailed weekly reports of individual sales. Some of these statements are as follows:

Market Conditions Committee Report, December 19, 1913

As the present method of reporting Current Net Values was adopted by the Association, it is a matter of deep regret to the Committee that all the members do not make this report, as the Committee would then have complete data upon which to base its conclusions. As it now stands, the 23 members who exchange this report are advised of the prices obtained by each other, but they have no knowledge of the prices obtained by the six members who do not report, while each of the six members is traveling along, and in the dark as to the prices obtained by the other 28 members of the Association. These conditions can not but have a depressing effect upon values, as all the members are not in the position to refute statements made by buyers regarding low prices, which they would be in if they knew from the reports of the member himself the prices he is getting for his Flooring. *All the steps taken during the past two years in the work of the Association, tending to greater publicity and a freer and franker exchange of information among the members themselves, have been of benefit to them, and in times of slackened demand and stories and rumors of low prices team-work among those who are vitally interested in maintaining stable conditions in their own industry has the greatest value to them.* (Vol. III, p. 203.)

Market Conditions Committee Report, January 28, 1914

The improved method of reporting current net values should also be noted. The old plan was to report the sales during the month which were shipped during the same month. Now all of the sales of the specified items during the month are reported, regardless of when shipment is made. This covers a larger range of transactions and more clearly indicates the trend of prices from month to month. (Vol. III, pp. 207-8.)

Market Conditions Committee Report, February 13, 1914

It has been hoped that the few members who do not make the Current Net Values report would conclude to do so in order that every member may have the benefit of knowing what every other member is getting for his Flooring, as there is no question but that some of the members, who do not make this report, are led to believe that other members are selling for less than they are actually getting, and the same condition applies to the members who do report, respecting the prices the members who do not report are said to be selling at. This, as you will readily see, can cause much demoralization in values, because if a buyer tells you that so-and-so is selling his Flooring at such a price, you are not in a position to refute his statement because you are not fortified with the information from the member himself of what he is getting for his Flooring. Whether or not all the members report, it would seem

that the interests of the Association can be best served by sending to every member the individual reports of Current Net Values, so I trust the members who are making these reports will waive the reciprocal conditions under which their reports are made and permit the information to be sent hereafter to the entire membership with the other regular monthly reports. (Vol. III, pp. 331-332.)

Market Conditions Committee Report, March 25, 1914

In view of this data, the present selling values of flooring may be considered \$3.50 off on Clear, \$2.00 off on No. 1, and \$3.50 off on Factory from the Recommended List of May 21, 1913, and while these values are lower than our statistics, the demand for our goods and the market price of the raw material warrant, *the Committee is convinced that without the exchange from month to month of the information in the individual reports of Current Net Values prices would have gone much lower because of the dull season of the year and the general uncertainty and apprehension regarding the business outlook for 1914.* (Vol. III, p. 205.)

Market Conditions Committee Report, September 24, 1914

In view of the complicated situation it would indeed seem prudent to go slow and be guided by a careful study of our statistics from month to month, pursue a policy of "watchful waiting" in respect to production, and safeguard ourselves all we can by a liberal exchange

among ourselves of all available information regarding trade conditions as they develop. (Vol. III, pp. 219-20.)

**Tenth Annual Report of the Secretary, January 29,
1915**

You have already received the annual statistics, and while they will be reviewed in detail in the report of the Market Conditions Committee, I would like to submit a contrast of stock conditions and current net values during the past three years. It proves beyond a doubt that cooperation can be made helpful in bad times as well as in good times. (Vol. III, p. 116.)

**Market Conditions Committee Report, February 25,
1915**

Because of the critical situation we are now in it is of the utmost importance that our statistical reports be in the hands of the membership very early in the month in order that the information in the reports may be of greater value to the association.

May we not depend upon your cooperation in this respect, because after all it takes no more time to make out your reports on the 2d or 3d of the month than it does to make them out two or three weeks later, and at this particular time of all times there is nothing more important to us all than to have accurate information as quickly as possible regarding conditions which have such a direct bearing upon our own welfare. (Vol. III, p. 233.)

Minutes of Association Meeting, July 16, 1915

The members who make the monthly reports of Current Net Values are in a position to analyze in detail the net prices obtained by other members and by each geographical group. If you are not making this report you are missing information that has proven to be of great value in handling sales. (Vol. III, p. 124.)

The great value both of the weekly sales reports and of the statistical reports, and the importance of their analysis by the members before attending the association meetings, were emphasized in the Report of the Market Conditions Committee dated October 28, 1921, part of which reads as follows:

Weekly Sales Reports.—The importance of making the Weekly Sales Reports regularly and promptly was discussed and the great value of the information contained in the reports regarding the current state of the market was conceded, and three of the members of the Committee who are not making these reports promised to do so. All the other members of the Association who are not making these reports are earnestly urged to do so, in order that every member of the Association may keep in close touch with conditions instead of working in the dark.

More Cooperation.—We wish to make the following recommendations in order that there may be more cooperation in the work of the Association:

1. That Dr. Earle, as President of the Association, is requested to call a general

meeting of the Association to be held as early in November as possible.

2. That all the members of the Association make their Weekly Sales Reports regularly and promptly.

3. That all the members send in during the first week in November their statistical reports for the month of October so that a conference can be held on November 16th or 17th.

4. That if the Secretary receives by November 7th all the October reports from all the members, that his report be made out and mailed to the members on November 10th or 11th, so they will receive the October statistics in advance of the meeting and have an opportunity to analyze them and can come to the meeting fully informed respecting trade conditions as reflected by the statistical reports. (Vol. III, pp. 254-255.)

A letter from Mr. Keehn, dated December 3, 1921, to the three members who were not then contributing to the weekly sales reports, again emphasized the value of the information contained in them, and especially of the information as to the current movement of flooring—a feature of the reports to which great importance was attached by several of the witnesses examined. This letter reads as follows (Vol. IV, pp. 535-536):

DECEMBER 3, 1921.

HOLT HARDWOOD COMPANY,
Oconoto, Wisconsin.

GENTLEMEN: One of the members of your Market Conditions Committee, writing about our latest weekly Record of Completed Trans-

actions, states that it is very gratifying to note the number of members who are now reporting regularly. They feel confident that the members who do not report, evidently having discontinued their reports because other members had neglected to report, now fail to realize the importance of the valuable information contained in our weekly reports and that all but three of the members are reporting.

We believe our Weekly Sales Reports to the members have a number of very good features. Aside from their indication of the current trend of the market, the demand for each grade, face and thickness in each wood, the total volume alone of weekly bookings in each group, and the total of all groups, is enlightening.

You probably had an unusually large volume of flooring orders for the week ended November 16th, and assumed that the experiences of the other members were similar, but could any member have known (or estimated) without the existence of our Weekly Sales Reports that the total New Business Booked of 19 members for the week ended November 19th was very close to five millions? Without these reports they could have knowledge only of an increased demand for Maple, Beech, and Birch Flooring, but the real extent of this demand as affecting the different grades and sizes of our flooring in combined volume would not be known until weeks later, upon the compilation of our November statistical reports.

It has occurred to us that you may feel that you can not afford to be without this exchange of information when you learn that all but three of our members have indicated they want this information by taking a minute or two of their time to daily record all sales on the blank forms provided and mailing them to us at the close of each week. And we and the reporting members would like to have our weekly reports show our members' sales 100% reported. We can do this if you, and the other two missing members we are writing to-day, will kindly send us the report of sales for week ended to-day. May we count on your cooperation?

Yours very truly,

GEORGE W. KEEHN,
Secretary.

The entire matter of the analysis and interpretation of the monthly, semiannual, and annual statistical reports which the members have regularly received from the association for many years, and of the value of those reports as a basis for estimating future conditions, is fortunately covered very adequately and fully in the Semiannual Report of the Market Conditions Committee dated July 20, 1917, and no comment other than to quote that report in its entirety is necessary. The report is as follows (Vol. IV, pp. 438-440):

To members:

GENTLEMEN: The statistical reports prepared by Mr. Keehn for the first half of the

year give all the available data of that character. Whether such reports are regarded as merely a comprehensive review and record of a past period or whether they have an additional value as a guide for the future, depends largely upon the method of their analysis and interpretation. When the significance of each of the various factors of the statistical data is determined and the influence of other factors, such as outside competition, building activity, and manufacturing costs, buying seasons and the character of the demand, is properly estimated, we have acquired the Eyes of Business, can see ahead with greater clearness, and can plan for the future with greater confidence of success.

As an aid in the analysis of statistics a barometer has appeared in our monthly reports during the past year to show a graphic comparison of conditions with the corresponding month of the previous year. The barometer gives a birdseye view of conditions but does not estimate the comparative value of its various factors. However, before discussing this feature, an explanation of the construction of the barometer, how and why it is thus made, may be informative and increase its value.

During January and February we had 25 members, during March 24, and during April, May, and June 23. The barometer is adjusted to these changing conditions in the following manner:

The first shaft is the Measure, and you may have noted that it is always the same height. It is an arbitrary yardstick.

The relative heights of the other shafts are determined by the percentage of increase or decrease of the various factors based on the reports of the same members for corresponding periods. Consequently the June, 1916, business of the two members who have dropped out since the first of this year was not considered in making the barometer for June, 1917.

The barometer each month reflects a comparison under like statistical conditions with the same month of the previous year.

Returning now to the comparative values of the various factors of the barometer:

The factors are:

Stock on Hand.

Unfilled Orders.

Shipments.

Production.

New Business.

Average Values.

Inasmuch as the value of any factor may change with the changes in surrounding conditions, it is impossible to formulate any arbitrary or fixed rules for determining market conditions. The monthly combination of factors is kaleidoscopic—never twice the same. Consequently the significance of the various factors of the barometer must be estimated by judgment based on experience.

This may be illustrated by the barometer for June. Based on the half year, it shows slightly less than the average "Stocks on

Hand," the lowest "Production," and the highest "Average Values" of the period. These are important factors and if considered by themselves would seem to foreshadow good results for July. But the other statistical factors show that relatively "Unfilled Orders" fell 26 points in June and that "New Business" and "Shipments" are the lowest in six months. This gives us comparative results based on corresponding periods last year.

To show the trend of current conditions, a comparison of May and June this year indicates that during June:

Stocks on Hand decreased 1 Point.

Unfilled Orders decreased 11 Points.

Shipments decreased 15 Points.

Production increased 4 Points.

New Business decreased 36 Points.

Average Values increased 3 Points.

The reduced volume of New Business in June may be due to earlier booking in anticipation of advancing prices, but the falling off in Shipments should be seriously considered. And it should also be noted that the first of this month records the smallest volume of Unfilled Orders shown this year.

It is obvious that right here the nonstatistical factors demand attention. These are:

1. Building Activity.
2. Character of Demand.
3. Manufacturing Costs.
4. Outside Competition.
5. Buying Seasons.

We know (1) that there is a material decrease in building activity that requires hardwood flooring; (2) that the demand for Clear is relatively less than for No. 1 and Factory; (3) that the manufacturing cost of flooring was never before so high as it is now and that costs are increasing; (4) that outside competition is active and aggressive; and (5) that July is normally a quiet month for new business and is more likely to be so under present conditions.

The foregoing brief analysis of conditions the first of this month affords a basis for the conclusion that the volume of Shipments and New Business for July will be less than normal, but that the special demand for No. 1 and Factory may support some advance in prices of those grades. It is also evident that at present the demand can not be increased by price concessions. Also that prices are not likely to be reduced on account of high manufacturing costs and easy warehouse conditions. The present manufacturing plan should be to reduce the output of Clear flooring and increase the output of No. 1 and Factory.

This is not a Semiannual Report in conventional form. It is rather a report and explanation of methods, and your committee has taken the liberty of offering it with the hope that it may suggest ways of analyzing our statistical reports from month to month

so that they may be more valuable to you as a basis for estimating future conditions.

Respectfully submitted.

MORRIS E. THOMAS, *Chairman,*

E. HARVEY WILCE,

B. P. WHEDON,

WILLIAM E. COX,

GEORGE STRABLE,

C. H. LAW,

J. D. STAPLE,

Of Market Conditions Committee.

VIII

Association Meetings

Article IX of the Articles of Association under which the defendants were operating when the petition was filed provides that an annual meeting for the election of officers and trustees and the transaction of other business shall be held on the third Wednesday of January of each year; that regular meetings for the transaction of business shall be held on the third Wednesday of April, July, and October of each year; and that special meetings may be called by the President or a majority of the Board of Trustees on not less than five days' notice. (Vol. III, p. 67.) Each of the Articles of Association under which the defendants operated from 1916 to 1922 contained a similar provision (Vol. III, p. 17, p. 28, and p. 40), but the Articles in effect from January 1, 1913, to December 31, 1915, provided that there should be five regular meetings in addition to the annual meeting (Vol. III, p. 4).

Mr. Keehn testified that he never kept a minute book, but that he made rough notes and wrote them up and mimeographed them and sent the reports to the members as memoranda of the proceedings of meetings. He also testified that he did not have any of the minutes of the meetings during the period when the Articles of Association dated January 1, 1913, or any of the succeeding articles were in effect, other than those he had given to the Department of Justice. (Vol. I, p. 79.) All those minutes or memoranda, and all other minutes, reports of the Market Conditions Committee, and reports and circular letters to members from the secretary, which the Government secured under subpoena duces tecum to each member of the association, were introduced in evidence and appear in various portions of the record. With reference to the Market Conditions Committee, Mr. Keehn stated:

These associations at one time had a committee called "Market Conditions Committee," with, I think, about 7 or 8 or 9 members. The functions or rather the duties of that committee were in a general way to find out the state of the market, the trade conditions, and to make an analysis of conditions generally and report to the association as to their findings. They sometimes made their reports to the association in the meetings, sometimes by mail to the association. I sent out the reports of that committee to the members of the association, and when the reports were made verbally at association meetings I

might reduce them to writing or they might be referred to in the minutes of the meetings. Anyway, I circulated them among the members of the association.

I couldn't say positively from what sources this committee got its information. I suppose from all sources. The committee ascertained from past transactions what the prices were at which maple flooring was being sold. (Vol. I, p. 95.)

The last report of the Market Conditions Committee which was introduced in evidence is dated October 28, 1921, and according to Mr. Keehn that committee was not succeeded by another committee, but a new committee was created called the "Cost Surveys Committee," and it has been operating since in accordance with the articles of association of January 1, 1922. (Vol. I, p. 96.)

With reference to the number of meetings held, Mr. Keehn testified:

Q. Now Mr. Keehn, going on to another matter, you held meetings?

A. Yes.

Q. How often were those meetings held?

A. *During the past year I think they were held about monthly, there may have been months they were not held. In former years they were held quarterly and semiannually and annually.*

Q. When did you begin holding those meetings monthly?

A. I would say from memory some time late in 1921 or during the year 1922.

Q. It is a circuitous track. *Anyway, those meetings began to be held monthly after the decision in the Hardwood Lumber Company case.*

A. *Not in every case monthly, but I would say in a general way monthly.*

Q. Before that they had been held quarterly?

A. There were sometimes special meetings, and semi-annual meetings and annual meetings.

The Court: Haven't you the records here that show the proceedings of these meetings?

A. We have many of them, but not any of the old ones.

Q. Did you keep minutes of all the meetings?

A. *We kept minutes of all meetings but didn't keep all minutes of all meetings.*

Q. What did you do with the minutes that you haven't got?

A. That we have got or haven't got?

Q. Haven't got?

A. They go back for a long period of time, and we don't keep all those things.

Q. Have you got all minutes for the last two years?

A. I think probably we have. (Vol. I, pp. 132-133.)

The first meeting in 1922 was held January 12th. Other meetings were held during that year on February 25th, March 9th, March 29th, April 20th, May 17th, June 21st, July 19th, August 16th, October 24th, November 15th, and December 19th.

We held meetings subsequent to that and are holding them now. (Vol. I, p. 134.)

And with reference to the proceedings and discussions at meetings of the association, Mr. Keehn testified:

We had no stenographer present at the meetings and didn't undertake to take down just what was said and done.

Q. You just made a memorandum of some things?

A. Made a memorandum of all things that were talked about in these meetings and wrote them up afterwards.

Q. Do you mean to swear that your minutes of those meetings show everything that was talked about?

A. By the Association as an Association meeting, with the exception of the details of the defense of this suit. That was not written out.

Q. Well, I believe you swore the other day that you didn't have, or didn't record the action of the meeting with reference to a discontinuing of that allotment?

A. No; we didn't record that. That was in 1920.

Q. In those meetings what did you discuss?

A. Well, *discussed trade conditions generally, as reflected by statistical information; they discussed the market prices of rough maple flooring or lumber; they discussed manufacturing and market conditions; they sometimes discussed labor conditions; they would devote a large amount of time to discussing the adver-*

tising campaign which the Association has had under way during the last year and a half or two years; spent considerable time on Grade Committee work, also on the petition presented to President Harding when he was alive about doing something on the duty on Canadian flooring; all those things were fully outlined in the minutes of the meeting.

Q. Did you ever discuss the price of maple flooring?

A. We do not discuss the price of maple flooring at the present time.

Q. Never mention it?

A. We do not discuss the future prices to be charged. There is no reason to discuss past prices because they are contained in the weekly sales report which the members have before they come to the meetings.

Q. You never mention the prices of flooring at all?

A. Not as an association discussion.

Q. What about the individuals that stand around?

A. I don't know what they talk about. They may talk about a hundred different things. I am speaking about the association discussions—what the association discusses.

Q. That is when they assemble around there and do not get up publicly to make speeches to each other?

A. They do not talk about the price of flooring they are going to charge.

They met every month and discussed the particular matters outlined in our minutes of the meetings. They were written up in the

minutes of the meetings. They usually meet at the Congress Hotel. Sometimes about 11 o'clock, and staying in session until about 12.30 or 1 o'clock, then have lunch and get together again about half past 1 or 2 o'clock, and many of them go to the ball game, and that is the end of the meeting. It usually breaks up about three o'clock. (Vol. I, pp. 134-135.)

On cross-examination Mr. Keehn testified further with reference to the same matter:

We have never discussed the prices to be charged or asked for maple flooring. We of course have the weekly reports of sales and monthly report, and which are past transactions, and sometimes as those reports were distributed at the meeting they looked them over. (Vol. I, p. 174.)

Mr. William L. Saunders stated on direct examination that at the association meetings in Chicago he met his maple-flooring friends with less trouble than would otherwise have been the case, that he was frequently able to dispose of rough maple lumber at the meetings to manufacturers who do not own their own stumpage; and that at the meetings they also discussed wages or manufacturing troubles, also car service, traffic difficulties, and the merits of the different flooring machines, etc. He also stated that standardization of flooring had been perfected only step by step during the past fifteen years and is one of the features of association work, and that at the meetings which he had attended there had never

been any discussions with respect to the *future* prices of flooring.

On recross-examination Mr. Saunders testified as follows:

Q. Since he went into these meeting matters, I will ask a question or two. You tried to prove the things you did not discuss when you get together. Do you ever say anything about the market for lumber?

A. Of our rough lumber?

Q. No; Maple Flooring; when you meet these gentlemen who are concerned in manufacturing Maple flooring, do you ever speak about market conditions?

A. As to the question of supply and demand—things of these kind, do you mean?

Q. Yes. Do you talk about that?

A. Individually, not collectively, not as an Association.

Q. You mean as you are standing about together, or lunching together, you talk that all over?

A. Yes, sir.

Q. Do you talk about the prices that you have been getting for your lumber?

Mr. DARBY. Do you mean flooring or lumber?

Mr. FOWLER. When I say lumber I mean flooring.

A. Personally, I have no knowledge of prices ever being talked.

Q. You talk about everything else but prices?

A. That is the least of our troubles.

Q. If you don't get a good price, you will soon go to the wall.

A. Yes, sir.

Q. That is what you are specially interested in?

A. Yes, sir. (Vol. I, p. 206.)

Q. So you mean to say that you gentlemen will talk about everything else connected with the Maple flooring industry but you won't hint prices?

A. I think that subject is the least discussed of any.

Q. Then it is discussed, is it? You say it is the least discussed?

A. Oh, it would be impossible not to mention it sometimes in your conversation. I might confess that my price was so-and-so, and the other fellow might say his was so-and-so.

Q. Since you have been reporting your prices from week to week, every single sale to the Association, why are you so awfully particular not to talk about it between each other?

A. The individual member does not know what my prices are as I report them to the Association.

Q. He did up to July last, didn't he?

A. Yes.

Q. Before last July—if your mouth had been shut so tight since—before last July when you were reporting your prices to the Secretary and he was sending it right out to every member of the Association, why were you so awfully particular not to talk about it?

A. I took the chance of his remembering as to what my quotations were previously and it wasn't necessary for me to mention it.

Q. Would you ever talk about what the prices would likely be in the future, whether prices were going up or down, market conditions were favorable or unfavorable, ever talk about that?

A. I might have expressed my opinion about that.

Q. Didn't you time and again talk that one thing?

A. You mean now as an individual talking to an individual?

Q. Individuals talking around there, either on the floor of the Association or at your luncheons, or anywhere?

A. Or in the lobby of the hotel?

Q. Lobby of the hotel or anywhere?

A. We might discuss those things.

Q. Well, didn't you, as a matter of fact?

A. I think, as a matter of fact, we would to certain extent. (Vol. I, p. 207.)

Mr. Frank M. Hodges stated on his direct examination that there could not have been more than two or three meetings after he joined the association in August, 1921, and he did not remember whether he attended all of them, and that he attended perhaps two-thirds of the meetings during 1922. (Vol. I, pp. 295-296.) The following interrogation then took place:

The COURT. Now, during 1922, at these meetings which you attended, was there any discussion of market conditions, trend of the market, prices realized?

A. I don't recall any such discussions in the meetings. We had reports of costs committees, of course, on rough lumber and manufacturing costs and things of that sort.

The COURT. You certainly discussed those, did you not?

A. Yes, sir.

The COURT. Can you tell me why? Was not the natural discussion of market conditions, the market trend, the outlook?

A. Yes.

The COURT. Will you tell me why there wasn't any discussion of it?

A. Well, I think that after the decision of the Supreme Court about those things that our attorneys advised us that those things were not to be discussed; I don't recall.

Q. But you did discuss the past transactions, did you not?

A. Oh, yes.

Q. And the cost of rough lumber and manufacturing costs and the advertising campaign was discussed?

A. Yes, sir.

Q. And traffic questions would come up, but those of past transactions, I understand, you discussed.

A. What do you mean?

Q. These reports which would show what—the monthly reports of the secretary.

A. Oh, yes.

Q. But there was no understanding or agreement with respect to future prices.

A. No, sir.

The COURT. What benefit did you derive from discussing past transactions?

A. Well, we were enabled to find out how much stock of certain grades had been shipped and what had been obtained for it, that was valuable information.

The COURT. What was the benefit of that?

A. It shows what stock was being moved at the time.

The COURT. Well, it enabled you to forecast what was going to happen in the future?

A. To a certain extent.

The COURT. And that was the only benefit?

A. To a certain extent; yes, sir. (Vol. I, pp. 296-297.)

On cross-examination Mr. Hodges testified as follows:

Q. How far is Tupper Lake from Chicago?

A. Oh, it is probably 900 miles, something like that.

Q. How long would you be in session there at Chicago?

A. One day, usually.

Q. When you had those meetings you had these weekly sales reports before you, didn't you?

A. Yes, sir.

Q. They were distributed around among you, weren't they?

A. Yes, sir.

Q. So that you would have them right before your eyes while you were going on with your discussions?

A. Sometimes they were.

Q. Anyway, after you got there, he distributed them among you?

A. Possibly the last week's statistics, if they had not been mailed he would distribute them at the meeting.

Q. Distribute them monthly. These stock reports and shipments and things of that kind, you had them before you, too, didn't you?

A. Yes, sir.

Q. So you had the whole situation there right before your eyes, every member during those discussions, did you?

A. We did not discuss them at the meetings.

Q. What did you have them before your eyes for? What were they distributed among you for, and why did you have them in the meeting if you did not discuss them?

A. Well, we could look them over; they were distributed to us there rather than to be mailed to us at our home.

Q. Well, what did you talk about, then, that was in those reports, if you didn't talk about prices?

A. About stock conditions, manufacturing costs, things of that sort.

Q. Now, you mean to say, do you, that when it came to a question of price on past transactions that your mouths were simply shut; is that right?

A. I wouldn't say that entirely. (Vol. I, pp. 297-299.)

As in the case of the discussion as to the value of the association statistics, Mr. Ralston was one of the

frankest witnesses examined with reference to the matters discussed at the association meetings.

On cross-examination he stated that he was a member of the Market Conditions Committee for about a year or a year and a half; that that committee simply gathered information as to the costs of manufacture, test runs, the average of the test runs and general information on the markets and on conditions for the benefit of the members of the association; that there was no report made of any kind to amount to anything but generally the committee just talked in the general meeting of what they had found, and that the report was discussed in the open meeting. (Vol. I, p. 330.) He then testified as follows:

Q. As a matter of fact, that is one of the principal things that was discussed in those meetings, was it not—the general market conditions?

A. *The general market conditions were always discussed; yes.*

Q. *And the range of prices?*

A. *Sometimes.*

Q. Wasn't that one of the things that was generally discussed—range of prices?

A. Not always; no.

Q. Didn't you consider where the prices were, going down or going up or had been going down or going up?

A. There was probably some talk of that, more or less, yes.

Q. That was the interesting thing, wasn't it, whether prices were going down or up?

A. Absolutely it is to any manufacturer, it might be.

Q. When you were talking about general market conditions, it was with reference to whether it would justify prices going up or whether it would necessitate their going down?

A. Not necessarily, it was merely the talk from that Committee was merely on general conditions and on the general state of the market.

Q. Wasn't the ultimate thing you had in mind whether or not the price should be advanced or whether you would have to lower the price?

A. That may be true, I couldn't say what was in their minds.

Q. Really, wasn't that true that that is what you were driving at all the time?

A. *There is no question at all if I went to one of those meetings, I went there to get information if I could as to market conditions and the reason I wanted that information was to know what I would do with my prices, yes.*

Q. *That was the ultimate object you had in mind all the time?*

A. Absolutely.

Q. *That is what you wanted all of this information for?*

A. *Why, it would be useless to us for any other purposes.*

Q. *And that is the reason all of you exchanged all this information about yourselves, was it?*

A. Yes, it was spoken of that way. (Vol. I, pp. 330-331.)

On redirect examination Mr. Ralston stated that it was a year and a half or two years before that he had been on the Market Conditions Committee and that he did not know of any Market Conditions Committee maintained by the present association. He never served on the Cost Surveys Committee of the present association, and ceased attending the association meetings about May, 1923. (Vol. I, pp. 331-332.) The following interrogation then took place:

Q. I wish you would state generally what was discussed or what had been discussed at the Association meetings, say, from March 1922, until you left.

A. The discussion was the cost of production, market conditions to some extent, advertising—the Association put on a very elaborate advertising campaign a year or so ago—and general conditions of the lumber industry and the flooring industry. I think that was practically the——

Q. About how long did those sessions last; how long did you use to stay at the Association meetings?

A. Sometimes only in the morning. Occasionally I stayed for lunch; sometimes I was there a while in the afternoon. Sometimes I got in trouble; was called down for leaving; I was accused of going out to get business and let the Association run itself.

Q. State whether or not at the Association meetings since its organization in 1922 they

discussed at those meetings the future prices of maple, beech, or birch flooring.

A. No; not at all. (Vol. I, p. 332.)

On recross-examination Mr. Ralston testified as follows:

Q. *You discussed past prices?*

A. *Past prices, yes; and general market conditions.*

Q. Did you stop right at the minute you were talking or did you stop an hour or two beforehand?

A. I really couldn't say where the stop was. The talk as a rule was all general.

Q. Just discussed the prices until you got up to the present and then you quit; is that it?

A. I didn't say that; I just simply said I really couldn't say. (Vol. I, pp. 332-333.)

An interesting commentary on the value of attending the Association meetings is contained in a letter dated January 31, 1923, from the North Branch Flooring Company to the Flanner Steger Land & Lumber Company and in the answer of the latter company dated February 5, 1923. Part of the first letter reads as follows:

The writer was very glad to see Mr. Flanner at the meeting last week and wishes to take this opportunity to encourage your regular representation at these meetings. *We can say from actual experience that the personal contact and association with the other members has become very valuable to us and we have been able to capitalize this to a remarkable degree.* (Vol. IV, p. 479.)

And the answer stated:

We are quite in accord with what you have to say regarding the value of attending the Flooring Association meetings. It is the expectation of Mr. Frank Flanner and myself that some one from this company will be at these meetings. (Vol. IV, p. 480.)

The appellant's brief states that "inasmuch as the expenses of members to and from the monthly meetings were paid by the association, it is not surprising that a majority of the members usually attended these meetings" (p. 232), but although that fact may explain why the member from Tupper Lake is able to make the 900-mile trip to Chicago every month, it does not explain why the member in Chicago is willing to contribute, through the association expense fund, a portion of the expenses of that trip. The latter fact certainly constitutes unparalleled generosity on the part of the member in Chicago, if, as intimated in the appellant's brief, the primary object in attending the association meetings is to secure the instruction or diversion offered by a great city or to make sales to customers in Chicago.

Great emphasis is placed by counsel for the appellants on the alleged reformation in the practices of the association in accordance with an opinion given by Mr. Newman after the decision by the Supreme Court in the Hardwood case. As stated heretofore, however, no change was made in the reporting system of the association on account of that decision, and the only material modification

made in the form of the association's activities appears to have consisted of the discontinuance of the Market Conditions Committee and of the monthly reports made by that committee analyzing and commenting on the association statistics, in accordance with the advice that the association "must see to it that no one classifies, analyzes, interprets, comments upon or makes any recommendations concerning the same, or makes any prophesies as to the future prices, output, or other matters." (Vol. III, p. 152.)

During the period from 1913 through 1921 the members of the association regularly received written analyses of conditions by the Market Conditions Committee along with their statistical reports, and it was not necessary for them to hold more than four or five meetings a year to transact the business of the Association. As testified by Mr. Keehn, however, the practice of holding monthly meetings was started *after the decision by the Supreme Court in the Hardwood case*, and meetings have been held nearly every month since then. The defendants who testified, and counsel for appellants in their brief, emphasize the necessity for the frequent meetings to discuss questions relating to grades and grading rules, to standardization, to manufacturing difficulties, to advertising, to traffic questions, to the tariff on flooring, to freight rates, and to labor troubles, but such questions must have arisen as frequently if not more frequently prior to 1922 than after that date, as no changes in the association grades or grading rules or in the standard

sizes have been made since the present articles of association went into effect.

The following table shows what subjects were actually most regularly discussed at the association meetings during 1922 after the reorganization of the association was completed and the new Articles of Association were adopted. The first twelve subjects are those suggested by the defendants as those requiring frequent discussion, and the last seven subjects are those which the government contends suggest the correct answer to the question why the practice of holding monthly meetings was instituted after the decision by the Supreme Court in the Hardwood Case and the consequent discontinuance of the written reports analyzing and interpreting the statistics.

1. Standardization.....							
2. Grades.....	Apr. 20	June 21	July 19		Oct. 24		
3. Manufacturing difficulties.....							
4. Marketing problems.....							
5. Advertising.....	Apr. 20		July 19	Aug. 16	Oct. 24	Nov. 15	Dec. 19
6. Traffic questions.....						Nov. 15	
7. Tariff on flooring.....				Aug. 16	Oct. 24	Nov. 15	Dec. 19
8. Freight rates (Rate Books).....							
9. Labor Troubles.....							
10. Manufacturing Costs.....							
11. Wages.....							
12. Merits of Flooring Machines.....							
13. Average Cost of manufacturing and marketing and reports on cost.....	May 17	June 21	July 19	Aug. 16	Oct. 24		Dec. 19
14. Surveys of Cost and Test Runs.....							Dec. 19
15. Special statistical comparison.....					Oct. 24		Dec. 19
16. Trade conditions and relations of supply and demand as reflected by Statistical Reports.....	Apr. 20		July 19	Aug. 16	Oct. 24	(?)	Dec. 19
17. Rough Lumber—Supply and Market Value.....	May 17	June 21	July 19	Aug. 16	Oct. 24	Nov. 15	Dec. 19
18. Flooring Data.....	Apr. 20	May 17	July 19	Aug. 16	Oct. 24	(?)	Dec. 19
19. Stock conditions.....	Apr. 20	May 17	July 19	Aug. 16	Oct. 24	(?)	Dec. 19

¹ Not mentioned in memorandum of meeting, but given in call for meeting as one of the subjects for discussion.

² Representatives of Department of Justice present at meeting.

NOTE.—The minutes of the Association meetings from which the data showing the subjects discussed was taken appear in the record as follows: April 20, 1920, Vol. III, p. 164; May 17, 1922, Vol. III, p. 171; June 21, 1922, Vol. III, p. 173; July 19, 1922, Vol. III, p. 176; August 16, 1922, Vol. III, p. 181; October 24, 1922, Vol. III, p. 185; November 15, 1922, Vol. III, p. 191; and December 19, 1922, Vol. III, p. 197.

That flooring data, stock conditions, and average costs computed in accordance with Article XIV of the Articles of Association were subjects of primary importance for discussion at the Association meetings held in 1922 is further shown by a consideration of the letters sent out by Mr. Keehn to remind the members of each meeting.¹

The letter dated May 10, 1922, with reference to the meeting to be held May 17, 1922, reads in part as follows:

Among the subjects to be discussed at the meeting are the following:

* * * * *

3. The Committee on Cost Surveys will meet on the afternoon of the 16th and will make a comprehensive analysis of the Average Cost of Manufacturing and Marketing Maple Flooring as ascertained according to Article XIV of the Articles of Association, and will make a report to the general meeting.

If you have recently purchased any rough Maple Lumber on the open market or if you have any information regarding any purchases or sales of same, will you please send the information on the 15th to the Secretary, giving the prices F. O. B. sawmill (omitting the location of the sawmill), and the cost of freight from the sawmill to your flooring plant? This information will be very useful to the committee in its work and it will be

¹ Letters to members giving the dates of meetings and the subjects for discussion were sent out under the following dates and are printed in the record as indicated: Vol. III, May 10, 1922, p. 170; June 15, p. 172; July 13, p. 175; Aug. 16, p. 181; Sept. 21, p. 184; Oct. 24, p. 185; Nov. 10, p. 190; Dec. 14, p. 196.

held strictly confidential and no information will be given revealing the identity of the buyer or seller, or the source of the information, if you so desire.

There has been a good volume of New Orders Booked since the last meeting, and it will be very interesting to know how business has been running during the first half of May. It looks as if the 13/16" x 2¼" face No. 1 Maple flooring will be oversold to a greater extent than on April 18th, the date of our last compilation.

Please remember to bring with you to the meeting the flooring data as per blank form below, so the data can be summarized and the members fully informed as to actual stock conditions, etc., on May 15th.

Yours very truly,

GEORGE W. KEEHN,
Secretary.

Flooring Data May 1-15, Incl.

Shipments.....	M
Production.....	"
New Orders.....	"

Stock conditions of 1½ x 2¼" face maple flooring

On May 15	Clear	No. 1	Factory	Total
Stock on Hand.....	M	M	M	M
Unfilled Orders.....	"	"	"	"
Unsold.....	"	"	"	"
Oversold.....	"	"	"	"

(Vol. III, p. 170).

Each notification of a meeting to be held requested the members to send or bring flooring data as per the blank form copied above and the letters dated July

13, 1922, and Aug. 10, 1922, emphasized the importance of this information as follows:

It is important to know how the flooring business is running so far this month and we wish to suggest that if the members will supply the data as outlined on the blank form below covering the first half of July and mail the data to us at the close of business July 15th, or on Monday the 17th at the latest, that we will compile same and have it ready as soon as the meeting is called to order. This will save time and give you a better opportunity to consider the relations of supply and demand as reflected by the data than if the matter is delayed by our not getting these reports until the members arrive in Chicago and then not getting them compiled until late in the afternoon. (Vol. III, July 13, p. 175.)

Please be sure and bring with you to the meeting the flooring data as per blank form below *so that you will have as complete information as possible regarding statistical conditions on the day of the meeting.* (Vol. III, Aug. 16, p. 181.)

That the flooring data requested in each notification of a meeting is especially important in enabling the members to forecast future conditions, and that the discussion of the statistical and trade conditions at least was not confined to the past, is indicated by the letter dated February 19, 1923, which Mr. Keehn sent to the members and which reads as follows (Vol. IV, p. 470):

FEBRUARY BUSINESS

To members:

GENTLEMEN: We have received flooring data from 14 members of the Association covering the first 13 days of February, from which it is estimated that if the business during the remainder of February averages about the same as the first 13 days and if the trade experiences of the other 8 members are about the same, that the February business will turn out about as follows:

Shipments about 26% less than in January.

Production about 21% less than in January.

New Orders about 41% less than in January.

The stock conditions of 13/16 x 2¼" face Maple flooring on February 13th of the same 14 members indicate as follows:

On Feb. 13—	Stocks on hand	Unfilled orders	Over- sold	% sold 14 mem- bers	% sold Feb. 1, all mem- bers
Clear.....	2, 158 M	8, 502 M	6, 344 M	394%	411%
No. 1.....	1, 424	6, 812	5, 388	478	407
Fety.....	1, 099	3, 118	2, 019	284	389
	4, 681	18, 432	13, 751	394	405

Yours very truly,

GEORGE W. KEEHN,

Secretary.

A note as to a discussion of the subject "trade conditions and the relations of supply and demand as reflected by our (the association's) statistical reports" is found in only two of the memoranda of meetings analyzed in the above table (p. 145). It is, however,

reasonable to assume from the statement in the letter dated December 14, 1922, to the effect that the November reports would be ready for the meeting so the members could know how the November business turned out, that those reports were discussed at the December meeting, to assume from the paragraph quoted above from the letter dated July 13, 1922 (p. 148), that the relations of supply and demand were discussed at the July meeting, and to assume from the following paragraphs in the letter dated October 24, 1922, not only that the subject of trade conditions and the relations of supply and demand was discussed at the October meeting but also that it has been the principal subject for discussion at every meeting:

It has now been two months since there has been a "gathering of the clan" and it is hoped that every member of the Association will be represented at the meeting so that trade conditions and the relations of supply and demand for flooring can be discussed and considered.

We expect to have our statistical reports for the month of September made out and in the mail for you on the 19th or 20th, so that you will have an opportunity to look them over in advance of the meeting, and see how the September business turned out. (Vol. III, p. 185.)

None of the memoranda of association meetings held since January 1, 1922, indicates that any discussion was held with reference to prices, past, present, or future, but the record contains letters to members dated June 15, 1922, and July 13, 1922, in

which Mr. Keehn specially requested the members to send in their weekly sales reports so that he could make up the association report and have it ready for the general meeting. (Vol. IV, pp. 461 and 462.) The remark appended to the request of August 15, "hoping you will be able to do this so that you will have information up to date regarding the market," certainly indicates that the sales reports were intended to be used as the basis for a discussion at the meeting of past and up to the minute prices, and substantiates Mr. Ralston's testimony that past prices and general market conditions were discussed at the association meetings even after the 1922 reorganization.

The evidence considered heretofore with reference to the procedure and discussion at the association meetings established that as in the case of the changes made in the sales and statistical reports shortly before the hearing in the court below the change made in the activities of the association after the decision by the Supreme Court in the Hardwood Case related entirely to the form of the activities and not at all to their substance and effect. The Market Conditions Committee was discharged, and the association resolved itself into a Committee of the Whole for the monthly discussion and analysis of the same matters which had formerly been discussed and analyzed in the monthly reports of the Market Conditions Committee. In fact, the practice of having the Market Conditions Committee analyze, interpret, and comment on the statistics was discontinued even before that committee

was discontinued, because the members recognized the superior advantages of their present system of discussions at association meetings. This is shown by the following paragraph from the minutes of the general meeting held August 19, 1921:

Market Conditions Committee.—Mr. Thomas, Chairman of the Market Conditions Committee, stated that his Committee had nothing special to report as a Committee, no meeting having been held prior to the convening of the general meeting, as the members of the Committee felt that trade conditions and our July statistics could be discussed to just as good, if not better, advantage by the Association as a whole as to hold a separate meeting of the Committee. (Vol. III, p. 137.)

IX

Results of Combination

The brief for the appellants states (p. 161) that the Government abandoned its contention that there had ever been uniformity of prices. *On the contrary, however, the Government contended during the argument in the Court below, and it still contends, that the activities carried on by the defendants through the defendant association, which have been described heretofore, have caused a much greater uniformity of prices than could possibly have obtained under conditions of free and unrestricted competition.*

Of course, no contention has ever been made that there has been an absolute uniformity in the prices obtained by the defendants, as, considering the nature

of the commodity, it would undoubtedly be impossible to accomplish such a result. Maple flooring is not an article like cement or linseed oil, with reference to which it is undisputed that one barrel of cement is just like any other barrel of cement, and that one gallon of linseed oil is just like any other gallon of linseed oil. Such a product as Maple flooring, however, reflects in its finished state not only differences in the quality of the raw material used, but also differences in the quality of the workmanship in machining and finishing. There are consequently bound to be some differences in the product put out by the different members of the association, and such differences inevitably cause some lack of uniformity in their prices. Some of the witnesses examined by the defendants stated that the quality of the flooring produced by the Cadillac mills is in their opinion superior to that of the other members, and that they are always willing to pay those mills about a dollar per M more than they are willing to pay the other mills, and other witnesses testified that in their opinion the flooring produced by Horner is inferior and is therefore unable to command as high a price as other mills obtain. The record also shows that some members of the association have special trade-marked brands of flooring which they advertise extensively, and for which they have a special trade from which they are able to secure prices somewhat higher than the general level. Those factors must, of course, be taken into consideration when determining whether a *substantial* uniformity of

prices has been established and maintained. (Vol. I, pp. 261, 431; Vol. II, pp. 492, 562-563, 564.)

The Government also contended in the court below, and now contends, that the operation of the plan under which the defendants have conducted their business for many years, and especially the minimum price or average cost plan, the reporting system, and the monthly meetings, all of which have been described heretofore, necessarily and inevitably have caused increases in prices to be made more rapidly and decreases in prices to be made less rapidly than would have been the case without such operation under the plan.

To prove its contentions with reference to a uniformity of prices and to the observance of the so-called average costs as minimum recommended prices, the Government introduced in evidence a number of tabulations based on the weekly sales reports. These constitute Exhibit 79, and most of them are printed in the record. (Vol. IV, pp. 583-796.) The evidence of Horace A. Lewis, a special agent of the Bureau of Investigation of the United States Department of Justice, who made the tabulations, and the discussion between court and counsel with reference to them, are found on pp. 846-859, Vol. II, of the printed record. Briefly stated, the explanation of these tabulations is as follows:

The item 13/16" x 2 1/4" Maple Flooring, standard lengths, in the three grades clear, number one, and factory, was selected for the price comparison because

it is the most representative. The 13/16'' x 2¼'' maple flooring constitutes approximately 70% of the entire amount of flooring produced by the members of the association, and the average percentages of the three grades produced are: Clear, 50%; No. 1, 35%; and Factory, 15%. The item 13/16'' x 2¼'' Clear Maple Flooring therefore constitutes approximately 35% of the total amount of flooring produced by the members. (Vol. IV, p. 842, Vol. III, side pp. 1622 and 2052.)

The tabulations based on the sales reports which were in the possession of the Government prior to the hearing in the court below were figured for the three grades, but those based on the reports which came into the possession of the Government during the course of the hearing were only figured for the clear grade because of the lack of time. Only the tabulations for the item 13/16'' x 2¼'' Clear Maple Flooring were therefore considered, and only those based on the sales reports for the weeks ending November 19, 1921, to June 30, 1923, inclusive, are printed in the record.

The procedure followed in making the tabulations was to take each sales report and to take from it and to set down on what Mr. Lewis called the tabulation sheet, all the data given with reference to each sale of the selected item. These sheets, therefore, have the same general appearance as the sales reports, and show in successive columns from right to left (1) the date of the order, (2) the number of the mill

making the sale, (3) the quantity, (4) the delivered price per M, and (5) the average freight rate. These items of information are merely transcribed from the sales reports, except that during part of the period the sales reports give the index letters or freight rate symbols, whereas the average or Cadillac freight rate is shown on all the tabulation sheets. Mr. Lewis testified, nowever, that in every case he decoded the freight symbols by using the freight-rate book. The next column is entitled "Actual freight allowed" and sometimes "Freight charged." It might more properly be termed "Actual Cadillac freight" or "Actual average freight," as it shows the freight per M feet calculated on the basis of the average freight rate shown on the sales report and of the association standard weight for the item of flooring under consideration of 2,000 pounds per M feet. It will be referred to hereinafter as the Cadillac freight. The practice adopted for the association rate books is, however, followed and the nearest multiple of 25 is actually used for the "freight allowed." Each calculation was checked with the freight table showing the cost of freight per 1,000 ft., which is included in the July 19, 1923, Rate Book and Index of Towns. The data given in one other column on the tabulation sheets, "commissions," is transcribed directly from the sales reports.

A uniform practice was unfortunately not followed in presenting the remaining data on the tabulation sheets. The sheets which were prepared first show

in the last column on the right what is called "Net Factory Price," which is the delivered price, less the Cadillac freight, less the commission, if any. Other tabulation sheets show what is called sometimes "Net Price Cadillac" and sometimes "Price F. O. B. Cars at Mill." The columns so entitled show the delivered price less the Cadillac freight. This might more properly be called the "Cadillac Base Price," and it will be so referred to hereinafter.

It is obvious that it is the Cadillac Base Price which must be considered when determining whether the so-called average costs have been maintained as minimum prices. As shown heretofore, the association rate books and delivered cost charts give the members (1) the so-called average cost, (2) the Cadillac freight rate, and (3) the delivered cost, which is the average cost plus the Cadillac freight. To determine whether the so-called "average costs" have been maintained as minimum prices, either of two methods could have been adopted for the purpose of comparing the prices actually obtained (as shown on the sales reports) with the so-called average cost; either the average cost *plus* the Cadillac freight could have been compared with the delivered price reported (as was done on the sales reports during the operation of the January 6, 1921, Minimum Price Basis, as described heretofore on p. 35), or the delivered price reported *less* the Cadillac freight could have been compared with the average cost. The Government chose the latter method, perhaps

unfortunately, as the use of the former would not have given the appellants an opportunity to claim, as is done on pages 336-348 of their brief, *that the commission allowed, if any, should also have been deducted in order to arrive at the Cadillac base price.* It is, however, frankly stated in the Appellants' Brief that that procedure, in accordance with which the elaborate calculations and charts appearing in the Brief and Appendices to the brief were prepared, *is based on the theory that what the seller received should be compared with the so-called "Average Cost."* The only trouble with that theory is that it has nothing whatsoever to do with any contention made by the Government or with any practice of the defendant association.

The actual comparison between the average cost as determined from time to time and reported to the members by the association, and the prices at which the members sold 13/16" x 2 1/4" clear maple flooring as shown by the weekly sales reports but reduced to a Cadillac base in the manner heretofore described, is made on what Mr. Lewis called the recaption sheets.

In order to illustrate clearly the manner of making this comparison, and also the different forms of tabulation sheets which were prepared, both the tabulation sheets and the recaption sheets of sales for the weeks ending, respectively, January 6, 1923, and June 30, 1923, are set forth in full below:

TABULATION SHEET

Net factory prices maple flooring, 13/16 x 2 1/4, for week ending January 6, 1923

(Vol. IV, p. 735)

CLEAR

Date	Mill	Quantity	Deliv- ered price	Freight rate	Freight charged	Commis- sions	Net fac- tory price
34	2	5,502	107.50	0.24	4.75	2.00	100.75
30	2	22,000	100.50	.24	4.75	2.00	93.75
30	2	60,000	100.50	.24	4.75	2.00	93.75
2	2	2,000	108.25	.39	7.75	2.00	98.50
3	24	17,000	102.50	.37	7.50	1.00	94.00
3	33	5,000	100.50	.27	5.50	2.00	93.00
4	33	5,000	100.00	.25	5.00	2.00	93.00
4	33	5,000	98.75	.19	3.75	2.00	93.00
5	33	11,000	100.00	.25	5.00		95.00
5	33	10,000	97.75	.19	3.75	1.00	93.00
2	5	5,000	103.50	.43	8.50	2.00	93.00
5	5	7,500	112.00	.85	17.00	1.50	93.50
2	14	25,000	98.00	.15	3.00	1.50	93.50
2	26	5,000	98.00	.16	3.25	2.00	92.75
2	30	15,000	103.50	.43	8.50	2.00	93.00
2	30	4,000	97.50	.18	3.50		94.00
6	37	16,000	107.50	.62	12.50	2.00	93.00
29	47	10,000	102.50	.37	7.50	2.00	93.00
29	47	2,000	102.50	.37	7.50	2.00	93.00
2	47	14,800	101.00	.25	5.00	2.00	94.00
4	47	30,000	99.00	.20	4.00	2.00	93.00
4	47	10,000	102.00	.35	7.00	2.00	93.00
5	47	10,000	99.50	.20	4.00	2.00	93.50
2	4	5,000	99.50	.22	4.50	1.50	93.50
2	4	6,000	99.75	.24	4.75	1.50	93.50
2	4	2,000	101.00	.27	5.50	1.50	94.00
6	4	1,000	100.50	.27	5.50	1.50	93.50
6	4	5,000	100.50	.27	5.50	1.50	93.50
6	4	40,000	103.50	.27	5.50	1.50	96.50
3	7	20,000	109.75	.52	10.50		99.25
4	7	1,000	97.50	Mill		1.50	96.00
4	7	3,000	100.00	.25	5.00		95.00
5	7	6,000	100.00	.20	4.00	1.50	94.50
6	7	10,000	98.00	.15	3.00	1.50	93.50
6	7	4,000	100.50	.27	5.50		95.00
5	34	12,000	100.50	.27	5.50	2.00	93.00
25	50	4,000	100.50	.27	5.50		95.00
25	48	12,000	105.00	.24	4.75		100.25

High:

Low:

RECAPTION SHEET

Average cost for last quarter of 1922 (Vol. IV, p. 734), 13/16 x 2 1/4, Clear Maple Flooring, was \$95.00 F. O. B. Cars at Flooring Mills, as shown by Association Report dated Oct. 25, 1922, Captioned Average Cost—Based upon three test runs of 1921.

[Compiled from Record of Completed Transactions]

Report of sales made during the week ended
January 6, 1923:

2 Sales @ \$94.00, total 14,000 ft.}	19,000 ft. = .043%
1 " " 94.75 " 5,000 " }	
23 Sales @ \$95.00	220,700 ft. = .508%
2 Sales @ \$95.50, total 12,000 ft.}	
2 " " 95.75 " 82,000 " }	
2 " " 96.00 " 20,800 " }	
1 " " 97.50 " 1,000 " }	
1 " " 98.00 " 40,000 " }	195,302 ft. = .449%
1 " " 99.25 " 20,000 " }	
1 " " 100.25 " 12,000 " }	
1 " " 100.50 " 2,000 " }	
1 " " 102.75 " 5,502 " }	
38 Sales	435,002 ft. = 100%

TABULATION SHEET

Net factory prices maple flooring 1 1/2 x 2 1/4, clear

(Vol. IV, p. 796)

[Compiled from Record of Completed Transaction for week ending June 30, 1923]

Date	Mill	Quantity	Delivered price	Av. Frt. rate	Act. Frt. allowed	Price F. O. B. cars at mill	Com.	Net price F. O. B. cars at mill
6-25	2	24,000	108.50	.18	3.50	105.00	2.00	103.00
6-27		3,850	119.50	.23	4.50	115.00	2.00	113.00
6-22	49	2,500	122.00	.85	17.00	105.00	2.00	103.00
		13,000	122.00	.85	17.00	105.00	2.00	103.00
6-30		15,000	112.50	.63	12.50	100.00	2.00	98.00
6-27	5	41,500	122.00	.85	17.00	105.00	1.50	103.50
6-29		17,000	109.00	.20	4.00	105.00		105.00
6-25		11,000	110.50	.27	5.50	105.00	2.00	103.00
6-30		30,000	122.00	.85	17.00	105.00	1.50	103.50
6-30		10,000	112.50	.37	7.50	105.00	1.50	103.50
6-28	26	5,000	108.50	.18	3.50	105.00	2.00	103.00

Net factory prices maple flooring 1½ x 2¼, clear—Continued

Date	Mill	Quantity	Delivered price	Av. Frt. rate	Act. Frt. allowed	Price F. O. B. cars at mill	Com.	Net price F. O. B. cars at mill
6-27	-----	1,000	113.00	.15	3.00	110.00	-----	110.00
6-26	-----	2,550	124.00	.85	17.00	107.00	2.00	105.00
6-25	30	12,000	110.50	.28	5.50	105.00	-----	105.00
6-27	-----	1,000	114.00	Mill	-----	114.00	-----	114.00
6-27	37	7,000	122.00	.85	17.00	105.00	2.00	103.00
6-25	47	20,000	105.00	Mill	-----	105.00	2.00	103.00
6-23	28	22,000	103.50	.27	5.50	98.00	-----	98.00
6-23	-----	15,000	107.75	.38	7.50	100.25	-----	100.25
-----	-----	5,000	107.75	.38	7.50	100.25	-----	100.25
6-25	34	8,000	115.50	.52	10.50	105.00	2.00	103.00
6-26	-----	800	110.00	Mill	-----	110.00	-----	110.00
-----	-----	9,000	110.50	.27	5.50	105.00	1.50	103.50
6-23	42	8,800	115.50	.43	8.50	107.00	2.00	105.00
6-25	-----	17,000	123.50	.85	17.00	106.50	2.00	104.50
6-25	-----	3,000	111.75	.24	4.75	107.00	2.00	105.00
6-30	50	6,000	100.50	.27	5.50	95.00	-----	95.00
-----	48	23,000	120.00	.24	4.75	115.25	-----	115.25

RECAPTION SHEET

Average cost for second quarter of 1923 (Vol. IV, p. 795), 13/16 x 2¼ clear maple flooring was \$105.00 f. o. b. cars at flooring mill, as shown by report of the association dated March 24, 1923, captioned Average Cost—Based upon composite results of nine test runs.

[Compiled from record of completed transaction report of sales made during the week ending June 30, 1923]

1 Sale @ \$95.00 total	6,000 ft.
1 Sale @ 98.00 "	22,000 ft.
1 Sale @ 100.00 "	15,000 ft.
2 Sales @ 100.25 "	20,000 ft.
5 Sales	63,000 ft. = 18.9%
14 Sales @ 105.00 total	210,000 ft. = 62.9%
1 Sale @ 106.50 "	17,000 ft.
3 Sales @ 107.00 "	14,350 ft.
2 Sales @ 110.00 "	1,800 ft.
1 Sale @ 114.00 "	3,850 ft.
1 Sale @ 115.25 "	23,000 ft.
9 Sales	61,000 ft. = 18.2%
28 Sales	334,000 ft. = 100%

It is apparent that the Cadillac base prices compared with the average cost of \$95.00 on the first recaption sheet above are not what are called the Net Factory Prices on the first tabulation sheet above, but are those prices plus the commission which had been deducted previously. As explained above (p. 157) this is done in order to have the actual delivered sales prices reduced to the Cadillac basis, but not to an actual mill realization basis. The brief for the appellants, however, contends that the average costs of the present association should be compared with the net factory prices and that they must be ascertained by deducting from the delivered prices, both the average freight and the commissions. The argument on this point shows a total inability or unwillingness to meet the Government's contention, which briefly stated again is that the association has prepared and distributed freight rate books and average cost charts which show not only the average costs or f. o. b. Cadillac prices, but also the delivered costs or prices at every destination in the country—the latter being equal in each instance to the average cost plus the average freight or cost of freight or Cadillac freight, as given by the freight rate book; and that the only proper method of comparing the prices actually obtained by the defendants with the average costs is to consider all the elements which are considered in the average cost charts and freight rate books, but no others.

This theory is, of course, inconsistent with any theory of equal *realizations* from sales by all the

members of the association, and the Government has never contended that anything of the kind has existed in the maple flooring industry. However, no contention can possibly be made that the delivered cost or price at any destination as given by the rate books and tables of delivered values, consists of the average cost, plus the average freight, plus the commission, as no reference to commissions is made in the present articles of association, or in the rate books or tables of values distributed during their operation. The theory requiring that the commissions be taken into consideration when comparing the actual prices reported with the average costs, must, however, work both ways, and if it is not correct to add the commission when using one method of comparison it can not be correct to deduct it when using the other method.

In order to demonstrate the Government's contention that the commissions paid, if any, can not properly be considered when comparing the prices obtained by the members with the so-called average costs, the two tabulation sheets heretofore set forth (pp. 159, 160) have been refigured as per the following tables so as to compare *the delivered prices reported with the delivered costs shown by the delivered cost charts.*

Week ending January 6, 1923—average cost of f. o. b. Cadillac price for 4" x 2 1/4" clear maple flooring, \$95.00, as per determination of average cost, October 25, 1922.

Delivered Price As reported on Sales Report	Delivered Average Cost, Equal to F. O. B. Cadillac Cost or Average Cost plus Average Freight or cost of Freight or Cadillac Freight as per Rate Books	Freight Rate As reported on Sales Report		Average Freight or Cost of Freight or Cadillac Freight As given by Freight Books for rate reported
		Rate	Index Letters	
107.50	99.75	0.24	BD	4.75
100.50	99.75	.24	BD	4.75
100.50	99.75	.24	BD	4.75
108.25	102.75	.39	CI	7.75
102.50	102.50	.37	CG	7.50
100.50	100.50	.27	BG	5.50
100.00	100.00	.25	BE	5.00
98.75	98.75	.19	AI	3.75
100.00	100.00	.25	BE	5.00
97.75	98.75	.19	AI	3.75
103.50	103.50	.43	DC	8.50
112.00	112.00	.85	HE	17.00
98.00	98.00	.15	AE	3.00
98.00	98.25	.16	AF	3.25
103.50	103.50	.43	DC	8.50
97.50	98.50	.18	AH	3.50
107.50	107.50	.62	FB	12.50
102.50	102.50	.37	CG	7.50
102.50	102.50	.37	CG	7.50
101.00	100.00	.25	BE	5.00
99.00	99.00	.20	BJ	4.00
102.00	102.00	.35	CE	7.00
99.50	99.00	.20	BJ	4.00
99.50	99.50	.22	BB	4.50
99.75	99.75	.24	BD	4.75
101.00	100.50	.27	BG	5.50
100.50	100.50	.27	BG	5.50
100.50	100.50	.27	BG	5.50
103.50	100.50	.27	BG	5.50
109.75	105.50	.32	EB	10.50
97.50		Mill		
100.00	100.00	.25	BE	5.00
100.00	99.00	.20	BJ	4.00
98.00	98.00	.15	AE	3.00
100.50	100.50	.27	BG	5.50
100.50	100.50	.27	BG	5.50
100.50	100.50	.27	BG	5.50
105.00	99.75	.24	BD	4.75

Week ending January 6, 1923—average cost or f. o. b. Cadillac price for $1\frac{1}{8}$ " x $2\frac{1}{4}$ " clear maple flooring, \$95.00, as per determination of average cost, October 25, 1922—Continued

SUMMARY

	Number of sales	Feet	%
Delivered Sales Less than Average Cost.....	3	19,000	04.4
Delivered Sales at Average Cost.....	23	213,500	50.0
Delivered Sales over Average Cost.....	12	195,302	45.6
Total.....	38	427,802	100.0

(NOTE.—The figures and percentages of feet sold appearing on this summary do not agree exactly with those on the first recaption sheet above (p. 159) as an error was made in totaling the sales at average cost on that sheet. The figures and percentages on this summary are correct.)

Week ending June 30, 1923—Average cost or f. o. b. Cadillac price for $1\frac{1}{8}$ " x $2\frac{1}{4}$ " clear maple flooring \$105.00, as per determination of average cost, October 25, 1922

Delivered Price As reported on Sales Report	Delivered Average Cost, Equal to F. O. B. Cadillac Cost or Average Cost plus Average freight or cost of freight or Cadillac freight as per Rate Books	Freight Rate As reported on Sales Report		Average Freight or Cost of Freight or Cadillac Freight As given by Freight Rate Books for rate reported
		Rate	Index Letters	
108.50	108.50	0.18	AH	3.50
119.50	109.50	.23	BC	4.50
122.00	122.00	.85	HE	17.00
122.00	122.00	.85	HE	17.00
112.50	117.50	.63	FC	12.50
122.00	122.00	.85	HE	17.00
109.00	109.00	.20	BJ	4.00
110.50	110.50	.27	BG	5.50
122.00	122.00	.85	HE	17.00
112.50	112.50	.37	CG	7.50
108.50	108.50	.18	AH	3.50
113.00	108.00	.15	AE	3.00
124.00	122.00	.85	HE	17.00
110.50	110.50	.28	BH	5.50
114.00		Mill		
122.00	122.00	.85	HE	17.00
105.00		.28		
103.50	110.50	.27	BG	5.50
107.75	112.50	.38	CH	7.50
107.75	112.50	.38	CH	7.50
115.50	115.50	.52	EB	10.50
110.00		Mill		
110.50	110.50	.27	BG	5.50
115.50	113.50	.43	DC	8.50
123.50	122.00	.15	HE	17.00
111.75	109.75	.24	BD	4.75
100.50	110.50	.27	BG	5.50
120.00	109.75	.24	BD	4.75

Week ending June 30, 1923—average cost or f. o. b. Cadillac price for $1\frac{1}{2}$ " x $2\frac{1}{4}$ " clear maple flooring \$105.00, as per determination of average cost, October 25, 1922—Continued

SUMMARY

	Number of Sales	Feet	%
Delivered Sales <i>less</i> than Average Cost.....	5	63,000	18.9
Delivered Sales <i>at</i> Average Cost.....	14	210,000	62.9
Delivered Sales <i>over</i> Average Cost.....	9	61,000	18.2
Total.....	28	334,000	100.0

The results of the above calculations are of course exactly the same as the results of the comparisons shown on the recaption sheets set forth on pages 160, 161, but on account of the variations in delivered prices due to freight differentials, the method of comparison last used does not give the information as to the actual spreads in prices that is given by reducing all the actual prices reported to a common basis.

All the Freight Rate Books, Tables of Values, Tables of Delivered Values, Average Cost Charts, Delivered Cost Charts, and Tables of Concessions and Additions secured by the Government were introduced in evidence, and all those relating to the period from January 1, 1921, to June 30, 1923, were used as the basis for the comparisons between the actual prices reported and the average costs. The following table gives the several average costs established during the period from November 12, 1921, to June 30, 1923, and the references to the tables or charts printed in the record on which they appear:

Average Cost F.O.B. Cadillac, 11" x 2 3/4" Clear Maple Flooring	Date Estab- lished	Title of Reports in Record	Reference
\$90.00.....	Nov. 17, 1921	Letter to Members, November 17, 1921.	Vol. III, p. 143.
\$90.00.....	May 31, 1922	Survey of Costs, May 31, 1922... Rate Book and Average Cost Charts, etc., May 31, 1922.	Vol. III, pp. 279-281. Vol. III, side pp. 737- 905.
\$95.00.....	Oct. 25, 1922	Survey of Costs, October 25, 1922.	Vol. III, pp. 284-286.
\$100.00.....	Feb. 15, 1923	Survey of Costs, February 15, 1923. Tables of Differentials and Average Cost Charts, Febru- ary 15, 1923.	Vol. III, pp. 287-289. Vol. III, side pp. 910- 929.
\$100.00.....	March 10, 1923	Survey of Costs, March 10, 1923.	Vol. IV, pp. 497-499.
\$105.00.....	March 24, 1923	Survey of Costs, March 24, 1923.	Vol. IV, pp. 499-501.

Because of the long intervals that elapsed between the determinations of average costs dated November 17, 1921, and May 31, 1922, and also between those dated May 31, 1922, and October 25, 1922, the comparisons between the actual prices reported and the average costs for the period prior to October 25, 1922, are not nearly as interesting as those for the period after that date, when the present association was functioning smoothly and was making Surveys of Costs at least quarterly as provided by Article XIV of the articles of association. The results of the comparisons shown on all the recaption sheets printed in the record nevertheless are shown below in summarized and tabulated form:

Comparison of sales of $1\frac{1}{2}$ " x $2\frac{1}{4}$ " clear maple flooring as reported by members and reduced to Cadillac Basis with average costs reported to members

Sales report for week ending—	Sales at average cost price as calculated by Association and distributed to members			Sales above average cost price			Sales below average cost price		
	Number of sales	Feet	Per cent of entire feet sold	Number of sales	Feet	Per cent of entire feet sold	Number of sales	Feet	Per cent of entire feet sold
1921									
Nov. 19....	5	67,500	5.1	2	7,953	0.7	66	1,232,567	94.2
Nov. 26....	10	153,750	21.4	7	43,109	6.9	34	520,636	72.5
Dec. 3.....	15	321,500	30.1	14	269,734	44.5	11	473,000	25.4
Dec. 10....	13	132,217	32.6	6	24,511	6.2	12	248,059	61.2
Dec. 17....	11	126,300	46.3	8	35,259	5.2	8	133,000	48.5
1922									
Jan. 14....	9	131,100	43.8	6	45,395	15.1	2	123,000	41.1
Jan. 21....	18	179,000	54.3	4	11,010	3.4	11	139,300	42.3
Jan. 28....	13	280,700	76.6	6	13,557	3.7	5	72,200	19.7
Feb. 4.....	7	84,187	38.2	8	15,956	7.3	10	120,000	54.5
Feb. 11....	21	177,000	34.9	8	28,052	5.5	16	302,356	59.6
Feb. 18....	7	31,450	12.6	8	33,240	13.4	6	184,300	74.0
Feb. 25....	11	78,000	46.0	8	29,277	17.2	5	62,500	36.8
Mar. 4.....	18	203,100	66.2	5	17,682	5.5	10	86,000	28.3
Mar. 11....	9	86,288	52.0	7	39,642	23.9	3	40,000	24.1
Mar. 18....	23	122,872	39.7	7	73,168	23.6	10	113,500	36.7
Mar. 25....	20	235,000	58.3	9	37,740	5.8	22	382,500	35.9
Apr. 1.....	10	91,460	37.7	3	18,264	7.7	8	132,500	54.6
Apr. 8.....	26	240,500	46.6	4	21,880	4.3	16	253,500	49.1
Apr. 15....	24	216,700	25.2	3	18,922	2.2	29	626,300	72.6
Apr. 22....	22	186,500	32.3	2	15,545	2.8	20	374,700	61.9
Apr. 29....	46	461,700	53.2	4	36,980	4.3	22	369,000	42.5
May 6.....	29	436,700	54.5	5	36,600	4.7	23	327,000	40.8
May 13....	42	528,000	56.7	13	133,519	15.5	13	268,500	27.8
May 20....	55	694,450	78.1	10	76,018	9.0	14	109,576	12.9
May 27....	74	834,400	61.3	16	244,828	18.0	17	281,320	20.7
June 3.....	5	914,865	70.7	12	105,449	8.2	11	272,800	21.1
June 10....	49	634,840	58.4	20	205,200	18.9	11	246,900	22.7
June 17....	37	557,250	77.2	14	135,141	18.8	3	29,000	4.0
June 24....	32	485,210	71.3	10	127,750	19.5	8	67,400	9.2
July 1.....	41	577,532	52.9	43	430,042	39.5	8	83,775	7.6
July 8.....	25	456,926	67.2	21	200,437	29.6	1	22,000	3.2
July 15....	11	175,373	31.7	23	249,186	45.3	7	127,000	23.0
July 22....	15	252,043	39.2	38	384,939	59.9	1	5,000	.9
July 29....	12	139,500	23.5	28	445,100	74.6	1	9,000	1.9
Aug. 5.....	14	211,500	36.6	23	337,290	58.5	2	28,000	4.9
Aug. 12....	8	122,000	23.6	29	394,000	76.4			
Aug. 19....	13	150,000	25.3	38	442,171	74.7			
Aug. 26....	6	179,000	25.2	46	579,879	74.8			
Sept. 2....	5	53,450	6.6	43	734,695	91.5	1	16,000	1.9
Sept. 9....				35	469,187	100			
Sept. 16....	1	1,500	0.3	44	436,339	99.7			
Sept. 23....				50	668,630	97.8	3	14,500	2.2
Sept. 30....				56	781,600	100.0			
Oct. 7.....				28	503,322	100.0			
Oct. 14....				49	815,100	100.0			

Comparison of sales of $1\frac{1}{2}$ " x $2\frac{1}{4}$ " clear maple flooring as reported by members and reduced to Cadillac Basis with average costs reported to members—Continued

Sales report for week ending—	Sales at average cost price as calculated by Association and distributed to members			Sales above average cost price			Sales below average cost price		
	Number of sales	Feet	Per cent of entire feet sold	Number of sales	Feet	Per cent of entire feet sold	Number of sales	Feet	Per cent of entire feet sold
1922									
Oct. 21.....				50	924,181	100.0			
Oct. 28.....	31	571,500	78.4	7	97,801	11.9	5	72,500	9.7
Nov. 4.....	27	526,000	78.2	8	84,300	12.6	5	62,000	9.2
Nov. 11.....	29	477,000	71.9	14	133,400	20.2	4	53,000	7.9
Nov. 18.....	12	229,000	46.4	4	114,500	23.2	2	150,000	30.4
Nov. 25.....	34	425,700	63.0	11	163,609	24.4	5	86,039	12.6
Dec. 2.....	26	489,101	73.4	9	124,400	18.7	5	53,000	7.9
Dec. 9.....	25	583,000	83.0	8	105,252	15.1	3	14,000	1.9
Dec. 16.....	43	966,350	82.1	15	150,145	12.8	3	60,000	5.1
Dec. 23.....	34	736,501	83.3	12	138,539	15.6	2	9,000	1.1
Dec. 30.....	33	668,619	73.6	12	135,300	15.0	5	104,000	11.4
1923									
Jan. 6.....	23	230,700	50.8	12	195,302	44.9	3	19,000	4.3
Jan. 13.....	46	1,262,800	91.4	9	63,740	4.7	4	55,000	3.9
Jan. 20.....	95	1,739,050	86.8	7	70,000	3.4	7	194,000	9.6
Jan. 27.....	91	1,287,000	85.2	17	194,000	12.8	5	31,000	2.0
Feb. 3.....	63	1,302,957	80.0	24	206,800	12.6	7	128,000	7.4
Feb. 10.....	14	409,000	39.2	30	603,350	58.0	3	29,000	2.8
Feb. 17.....	16	269,500	29.2	34	626,300	68.0	1	26,150	2.8
Feb. 24.....	39	696,000	59.8	16	300,800	25.9	8	167,000	14.3
Mar. 3.....	31	552,000	76.4	14	118,870	16.4	5	52,000	7.2
Mar. 10.....	22	385,600	53.3	18	271,839	37.4	3	67,000	9.3
Mar. 17.....	21	322,000	54.0	13	204,000	34.1	4	71,000	11.9
Mar. 24.....	26	398,000	42.4	24	466,300	49.7	5	74,000	7.9
Mar. 31.....	7	104,000	19.9	5	121,200	23.2	16	297,400	56.9
Apr. 7.....	15	362,000	64.9	5	89,000	10.0	12	106,800	19.1
Apr. 14.....	26	396,700	71.1	9	114,689	23.0	4	32,500	5.9
Apr. 21.....	12	134,000	35.2	13	233,100	61.1	2	14,000	3.7
Apr. 28.....	11	526,325	73.6	10	174,051	24.3	1	15,500	2.1
May 5.....	12	222,300	55.8	10	161,420	40.4	2	15,000	3.8
May 12.....	8	131,100	41.9	9	177,970	57.1	1	3,303	1.0
May 19.....	6	45,000	43.4	6	58,500	56.6			
May 26.....	4	157,500	46.2	15	176,010	51.3	2	7,000	2.5
June 2.....	6	47,000	14.4	17	147,220	61.6	4	61,500	24.0
June 9.....	1	5,000	9.2	3	39,905	73.4	2	9,500	17.4
June 16.....	4	21,000	27.0	4	14,450	16.6	4	46,000	56.4
June 23.....	9	123,500	59.7	11	83,200	40.3			
June 30.....	14	210,000	62.9	9	61,000	18.2	5	63,000	18.9

(NOTE.—The brief for appellants (pp. 345-346) calls attention to the fact that for the weeks ending September 30, October 7, October 14, and October 21, 1922, the recaption sheets compare the Cadillac Base prices with the average cost dated October 25, 1922, or \$95.00, instead of with the earlier lower average cost of May 21, 1922, or \$90.00. The error obviously was not unfair to the defendants, as it represented some sales as having been made at prices less than the average cost, which the Government contends is a *minimum price*, whereas the correct comparison shows that during those weeks *every sale was made at a price above the minimum price*. The corrected figures have been used in the above tabulation.)

The following tables gives summaries of the above figures for: (1) Each month of the period from November 19, 1921, to June 30, 1923; (2) The period from November 19, 1921, to March 25, 1922, or until the reorganization of the Association was consummated by the adoption of the present articles of association; (3) The period from April 1, 1922, to June 30, 1923, or the entire period of the operation of the Association under its present articles of association; (4) The period from October 28, 1922, to June 30, 1923, when the Association was operating smoothly and was preparing and sending out Surveys of Costs at least quarterly as provided for in the present articles of association, and (5) The entire period from November 19, 1921, to June 30, 1923.

The results shown clearly demonstrate that there has been a remarkable uniformity in the delivered prices charged by the defendants, and an even more remarkable observance of the so-called average costs as *minimum prices*, especially during the operation of the association under its present articles of association.

TABLE I

Period	Sales at average cost			Above			Below		
	No. sales	Feet	Per cent	No. sales	Feet	Per cent	No. sales	Feet	Per cent
1921									
Nov.....	15	221,250	10.9	9	51,062	2.5	100	1,753,203	86.6
Dec.....	30	580,017	31.8	28	329,504	21.5	31	854,030	46.7
1922									
Jan.....	40	500,800	50.3	16	60,962	7.0	18	334,500	33.7
Feb.....	46	370,637	32.3	32	106,525	9.3	37	669,156	58.4
March.....	70	647,260	45.1	28	168,232	11.8	45	622,000	43.1
April.....	128	1,190,860	39.1	16	111,591	3.6	95	1,756,000	57.3
May.....	200	2,463,550	62.5	44	490,965	12.5	67	986,396	25.0
June.....	123	2,592,165	68.5	56	573,540	15.2	33	616,100	16.3
July.....	104	1,601,374	45.0	153	1,709,704	48.1	18	246,775	6.9
Aug.....	41	602,500	27.1	136	1,733,340	71.7	2	28,000	1.2
Sept.....	6	54,950	1.7	228	3,090,451	97.3	4	30,500	1.0
Oct.....	31	571,500	19.2	134	2,340,404	78.4	5	72,500	2.4
Nov.....	102	1,657,500	66.2	37	495,899	19.6	16	351,039	14.0
Dec.....	161	3,443,571	79.4	36	653,636	15.0	18	240,000	5.6
1923									
Jan.....	255	4,509,550	84.6	45	523,042	9.8	19	299,000	5.6
Feb.....	129	2,677,457	56.2	104	1,737,250	36.5	19	350,150	7.3
March.....	107	1,761,600	50.3	74	1,182,209	33.7	33	561,400	16.0
April.....	64	1,419,025	64.5	37	610,840	27.7	19	108,800	7.6
May.....	30	555,900	48.1	40	573,900	49.7	5	25,303	2.2
June.....	34	406,500	43.6	44	345,775	37.1	15	180,000	19.3
Total period.	1,725	27,984,166	50.8	1,317	16,917,831	30.8	599	10,144,872	18.4

TABLE II

Period	Sales at average cost			Above			Below		
	No. sales	Feet	Per cent	No. sales	Feet	Per cent	No. sales	Feet	Per cent
Nov. 19, 1921, to March 25, 1922..	210	2,499,964	32.7	113	723,285	9.5	231	4,232,900	57.5
April 1, 1922, to June 30, 1923.....	1,515	25,574,202	53.6	1,204	16,192,546	33.9	368	5,911,963	12.4
Oct. 28, 1922, to June 30, 1923.....	913	17,002,803	66.8	444	6,230,352	24.4	149	2,248,192	8.8
Nov. 19, 1921, to June 30, 1923.....	1,725	27,984,166	50.8	1,317	16,917,831	30.8	599	10,144,872	18.4

An analysis of the recaption sheets comparing the so-called average costs with the actual sales prices reduced to the Cadillac basis for the periods before and after changes were made in the average costs clearly demonstrates the soundness of the Government's contentions that the so-called average costs are in fact recommended prices and that they exert a strong influence on the members' actual selling prices.

The October 25, 1922, average cost of \$95.00 for $1\frac{1}{4}$ " x $2\frac{1}{4}$ " Clear Maple flooring was well established as the Cadillac base price even before the survey of costs of that date was prepared, so very apparently in that instance the prevailing market price for the item was accepted and was sent out as its average cost.

The sheet for the week ending January 6, 1923, shows that only three sales were made at Cadillac Base prices under the \$95.00 average cost; that the prices on two of these sales were only \$1.00 per M under the average cost and the price on the other was only 25¢ per M under the average cost, and that the total amount of these sales was only 19,000 ft., or 4.3% of the total volume sold during the week. The same sheet shows that *23 sales, totaling 220,700 ft., or 50.8% of the entire amount, were made at the Cadillac Base price exactly equal to the average cost*, and that twelve sales aggregating 195,302, or 44.9% of the total amount, were made at Cadillac Base prices above the average cost. Of these sales two were made at each Cadillac Base price, respectively,

50¢, 75¢, and \$1.00 per M more than the average cost. (Vol. IV, p. 734.)

No material changes in the comparative results appear on the recaption sheets for the weeks ending, respectively, January 13, January 20, and January 27, 1923, except that the number and volume of sales made at the Cadillac Base price exactly equal to the average cost were much larger. The figures for those weeks are as follows:

Sales at Cadillac base price exactly equal to average cost for item of \$95.00

	Sales	Ft.	% of total
January 13.....	46	1,262,800	91.4
January 20.....	95	1,739,050	86.8
January 27.....	91	1,287,000	85.2
February 3.....	63	1,302,957	80.0

For the same weeks, the volume of sales made at Cadillac Base prices below the average cost was respectively 55,000 ft. or 3.9%; 194,000 ft. or 9.6%; 31,000 ft. or 2%, and 128,000 ft. or 7.4%, and during the first three of those weeks the Cadillac Base price for 71% of the total volume of the sales below and above the average cost did not vary from the average cost by more than \$1.00 per M. (Vol. IV, pp. 736, 739, 743, 747.)

The Cadillac Base price of \$100.00 per M first appears on the sheet for the week ending January 20, 1923, as the price on one small sale. It is the highest price appearing on that sheet. One small sale at the same price appears on the sheet for the week ending January 27, but on the sheet for the week ending February 3, there are 12 sales for a total of 125,000 ft.

at the \$100.00 per M Cadillac Base price. This represents 60% of the total volume sold at Cadillac Base prices above the established average cost of \$95.00.

The sheet for the week ending February 10 (Vol. IV, p. 751) shows 3 sales totaling 29,000 ft. or 2.8% of the entire amount, made at Cadillac Base prices under the average cost, 14 sales totaling 409,000 ft. or 39.2% of the entire amount made at Cadillac Base prices exactly equal to the average cost, and 30 sales totaling 603,350 ft. or 58% of the entire amount, made at Cadillac Base prices above the average cost. Eighteen sales aggregating 513,100 ft., or 85% of the volume sold for more than the average cost, were made at the \$100.00 per M Cadillac Base price. *Apparently \$100.00 per M was accepted as the prevailing Cadillac Base price for 13/16" x 2 1/4" Clear Maple flooring, and the Survey of Costs dated February 15, 1923, established exactly that figure as its average cost.*

The sheet for the week ending February 17, of course, does not reflect to any considerable extent any results from the distribution to the members of the increased average cost. The comparison for that week is therefore still made with the \$95.00 average cost. The sheet shows 1 sale, aggregating 26,850 ft., or 2.8% of the total, at a Cadillac Base price below the average cost; 16 sales, aggregating 269,500 ft., or 29.2% of the total, at the Cadillac Base price exactly equal to the average cost; and 34 sales, aggregating 626,300 ft., or 68% of the total, at Cadillac Base prices above the average cost. Twenty-one sales, for a total of 357,100 ft., or 38.7% of the

total, were made at the \$100.00 per M Cadillac Base price. (Vol. IV. p. 754.)

The sheets for the weeks ending February 24 and March 3 show clearly the results accomplished by sending out the Association report dated February 15, which established the increased average cost. For the week ending February 17 twenty-two sales, aggregating 436,850 ft., or 47.4% of the total, were sold at Cadillac Base prices less than \$100.00, but for the week ending February 24 only 8 sales, aggregating 167,000 ft., or 14.3% of the total, were sold at Cadillac Base prices below the new average cost of \$100.00 per M; and for the week ending March 3 only 5 sales, aggregating 52,000, or only 7.2% of the total, were sold at prices below the average cost. Respectively, five and three of the lower sales appearing on the two sheets were made at Cadillac Base prices equal to the old \$95.00 average cost. For the same weeks there were, respectively, 36 sales, aggregating 696,000 ft., or 59.8% of the total, and 31 sales, aggregating 552,000 ft., or 76.4% of the total, made at the Cadillac Base price exactly equal to the \$100.00 average cost. (Vol. IV. pp. 757, 760.)

The sheets for the weeks ending respectively March 10 and March 17 do not show any material changes in the comparisons. They show respectively three sales aggregating 67,000 ft., or 9.3% of the total amount, and four sales aggregating 71,000 or 11.9% of the total amount, at Cadillac Base prices less than the average cost; 22 sales aggregating 385,600 ft. or 53.3% of the total amount and 21 sales aggregating 322,000 ft. or 54% of the total

amount at the Cadillac Base price exactly equal to the average cost; and 18 sales aggregating 271,839 ft. or 37.4% of the total amount and 13 sales aggregating 204,000 ft. or 34.1% of the total amount at Cadillac Base prices above the average cost. (Vol. IV, pp. 763, 765.)

The Cadillac Base price of \$105.00 appears on the sheet for the week ending February 24. The sheets for that and the following weeks show:

Sales at Cadillac Base price of \$105.00

	Sales	Feet	Per cent of total amount sold
February 24.....	2	8,000	0.7
March 3.....	7	58,370	8.0
March 10.....	10	197,000	27.3
March 17.....	6	119,000	19.9

A Survey of Costs dated March 10, 1923, was prepared and distributed to the members, but it did not make any change in the average cost for 13/16 x 2 1/4" Clear Maple Flooring. Another Survey of Costs dated March 24 was prepared and distributed, and it adopted the Cadillac Base price of \$105.00 as the new increased average cost.

The sheet for the week ending March 24 shows 5 sales aggregating 74,000 ft., or 7.9% of the total amount, made at Cadillac Base prices less than the average cost, the \$100.00 average cost of February 15, of course, being still used as the basis of comparison, 26 sales aggregating 398,000 ft. or 42.4% of the total amount made at the Cadillac Base price exactly equal to the average cost, and 24 sales aggregating 466,300 ft., or 49.7% of the total amount made at Cadillac Base prices higher than the average

cost. Fifteen of these sales aggregating 242,300 ft., or 25.8%, of the total amount were made at the Cadillac Base price of \$105.00 per M.

The full effect of the Survey of Costs dated March 24, 1923 (Saturday) could not of course be reflected in the sales for the week ending the next Saturday, March 31, but the sheet for that week nevertheless makes the comparison with the new average cost of \$105.00. On that basis it shows 16 sales aggregating 297,400 ft. or 56.9% of the entire amount made at Cadillac Base prices less than the average cost; seven sales aggregating 104,000 ft. or 19.9% of the entire amount made at the Cadillac Base price exactly equal to the average cost, and 5 sales aggregating 121,200 ft. or 23.2% of the entire amount made at Cadillac Base prices above the average cost. Nine sales aggregating 151,500 or 28.9% of the entire amount were sold at the Cadillac Base price exactly equal to the old average cost of \$100.00, and if that had been used as the basis of comparison, only 3 sales representing .5% of the entire amount would have been sold at lower Cadillac Base prices.

The sheets for the weeks ending April 7 and April 14 reflect the full effect of the action establishing the increased average cost of \$105.00 per M. They show:

Sales at Cadillac base price exactly equal to new average cost of \$105.00

	Sales	Feet	Per cent of total amount sold
April 7.....	15	362,000	64.9
April 14.....	26	396,700	71.1

The same sheets show respectively 12 sales aggregating 106,800 ft. or 19.1% of the total amount and 4 sales aggregating 32,500 ft. or 5.9% of the total amount at Cadillac base prices below the average cost, but of these sales, respectively 5 sales aggregating 41,000 ft., or 38.4% (of amount sold below average cost) and 3 sales aggregating 28,000 ft., or 86.1%, were made at the Cadillac Base price exactly equal to the old average cost.

X

Economic defense

The defendants introduced in evidence in the court below the depositions of Edward Gordon, Grant Keehn, Professor Hettinger, and Professor Vanderblue, statisticians and economists either now or formerly connected with the Harvard School of Business Administration. Mr. Gordon and Mr. Keehn explained a number of comparative charts and tables which were introduced as exhibits to their depositions, and on the basis of which they testified that, as stated by Mr. Keehn—

the study which Mr. Gordon and I made developed data and material such as to clearly indicate that the members of the Association did not have the ability to continuously control the prices of maple flooring, or, even if it be assumed that they had such ability, comparisons with other prices, with prices of competing floorings, with the costs of maple flooring, and with the conditions of supply and demand of that product, do not offer any evidence of fixation or unreasonableness. (Vol. II, p. 714.)

Professors Hettinger and Vanderblue testified that they had reviewed the work of Mr. Gordon and Mr. Keehn and concurred in their conclusions.

The charts and tables introduced in connection with the defendants "economic defense" covered the period from 1913 through the first half of 1923, and the conclusion that they do not offer any evidence of the fixation or control of the prices of maple flooring of course pertains to the same period. According to these statisticians and economists, therefore, they have conclusively demonstrated that the agreements, called the Allotment Articles and the Minimum Price Plans and the Minimum Price Basis of the Maple Flooring Manufacturers Association, and the operation of the association and its members under and in accordance with those agreements; the practice of having a committee of experts, called the Market Conditions Committee, analyze statistics and conditions and advise the association members as to the prices they could and should obtain and as to the policies they should follow with reference to sales and production; and the practice of holding association meetings at which a "consensus of opinion" was frequently reached as to the prices that should be obtained, *did not constitute fixation or control of the prices of maple flooring.* If the price comparisons made by this economic defense have any value or probative force for the purpose for which they were used, they certainly indicate that there has been price fixation or control of the com-

modities used as the basis of comparison rather than that there has been no fixation or control of the prices of maple flooring.

John Knox Arnold, a special agent of the Federal Trade Commission who has been engaged for twelve years in the investigations of industries, usually under Congressional resolutions, testified as a witness for the Government. After analyzing the exhibits to the Gordon and Keehn depositions, Mr. Arnold stated a number of reasons why the conclusions reached by Mr. Keehn and Mr. Gordon can not possibly be proved by the charts and tables introduced by them for that purpose. Some of these reasons as given by Mr. Arnold are as follows:

The COURT. Let me ask you this question: From your experience in research work is it not true that unless there is an absolute monopoly and thus an absolute control, will not the general trend of prices of any commodity be in accordance with the law of supply and demand—now I mean by that the trend?

A. The trend will be; yes, sir. (Vol. II, p. 821.)

It must be kept constantly in mind that such charts merely show the direction and rate of the change and not the extent or magnitude of the change.

An attempt has been made by means of various charts, indicated as exhibits in the testimony of Messrs. Gordon and Keehn, to show that other causes than concerted action or control have been responsible for the extent or magnitude of changes that have occurred

in the prices, production, and stocks of maple flooring. To do this, it would of course be necessary to account for one hundred per cent of all changes in prices, production, and stocks as being due to other causes, so as to leave nothing for the control cause to effect; but this has not been done, no such exact quantitative effect is shown by any of the charts; only trends and especially cyclical trends are shown, which is attempted to disprove control by ignoring it; by the same method it could be shown that costs of production have no effect upon prices of maple flooring. Merely omit costs and state that the other factors show the same trend of movement as the prices show, which would probably be true, and it would be proven that cost don't affect prices. (Vol. II, p. 823.)

In connection with what you have just stated, your Honor, I might add this, that in describing these charts and these trends, and so forth, I have not been criticising their use in connection with this so-called cyclical trend, which merely is a guess and something that is necessary, however, in the business, because it is a little better guess than a guess based on nothing. It has not been perfected up to this time, however, to any considerable extent. *What I am basing my remarks on is solely whether these charts and the comment on them prove that there was not control. I do not argue on the other side that the charts prove there was control, because you can not prove that by charts; you can't prove it either way.* (Vol. II, p. 824.)

XI

Discussion of the Law

1. *It is not necessary to prove a direct agreement to fix or control the prices of the commodity in question. It is sufficient to prove the adoption of a plan or scheme, which in its operation necessarily affects the prices; and to warrant an injunction it must, of course, be also shown that the plan or scheme is in operation.*

In *American Column & Lumber Company v. United States*, 257 U. S. 377, 399, the Court said:

Obviously the organization of the defendants constitutes a combination and confessedly they are engaged in a large way in the transportation and sale of lumber in interstate commerce so that there remains for decision only the question whether the system of doing business adopted resulted in that direct and undue restraint of interstate commerce which is condemned by this antitrust statute.

See also *United States v. American Linseed Oil Co.*, 262 U. S. 371.

2. *The question of fact is: Does the operation of the scheme materially affect the prices or production of the commodity moving in interstate commerce?*

In fact, the real matter of inquiry is the effect of its operation upon *prices*; but curtailment of production is important because prices are thereby increased. Strictly speaking production is a local matter; and it is only when its reduction is coupled with an intent to increase the price, or the effect of its reduction is necessarily to increase the price, that its willful curtailment is unlawful.

With reference to prices, the Chief Justice, speaking for the Court, in *Board of Trade v. Olsen*, 262 U. S. 1, 39, 40, said:

If a corner and the enhancement of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulations of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in that commerce are equally direct. *The question of price dominates trade between the States.* Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it.

3. *As heretofore shown, the operation of the association brought about uniformity of price in about 50% of the sales of the most important kind of flooring made between October, 1921, and June, 1923, and prices equal to or in excess of the so-called cost price in at least 82% of the sales during that period. But it is wholly unnecessary to prove that the operation of the scheme or plan does, or will, produce uniformity of prices.*

The question is, are prices made higher or lower than they would be if controlled entirely by the natural law of supply and demand? In the *Hardwood* case great reliance was had by the members of the association upon the fact that there was never a condition approaching uniformity. In fact the spread between the highest and lowest prices became greater. For illustration, the spread in prices of f. a. s. sap gum in January, 1919, was \$7.00, while in

January, 1920, it had increased to \$22.50. During the same period the spread in f. a. s. plain white oak increased from \$6.00 to \$81.25; and in No. 1 common poplar from \$5.00 to \$53.25. It was urged that this conclusively showed that there was no agreement to fix prices. But the Court held that, while it was perfectly apparent that there was no understanding to fix prices, yet the scheme when operated induced every one to get the *highest* prices he could, and gave him the exact information which enabled him to extort the highest prices.

In the Linseed Oil case (*United States v. American Linseed Oil Co.*, 262 U. S. 371) sometimes the prices would remain practically uniform for months, and then movements would begin which resulted in the most variable prices extending over weeks and sometimes months. But it was manifest that the actions of the several members were much more greatly affected by that of other members than they would have been if competition had been unrestrained.

The extent of the uniformity produced by a scheme of this kind depends upon the conditions of the market and very greatly upon the nature of the commodity. Take a stable commodity like flour, where the profit is but a small amount per hundred pounds, the variation in prices is necessarily small regardless of whether the millers have an association or not. With lumber it is different. In an active market the profit upon a thousand feet may be several dollars; and while one man may be satisfied with a profit of \$3.00 per thousand, another will

want to exact \$5.00, or if possible \$10.00 per thousand. When the market is inactive the prices are nearer uniform, but through concert of action arising from the knowledge each one has of the business of all of his competitors, the prices are held at an unnaturally high level. Under both conditions the effort of the association members is to get all they possibly can and to aid each other in getting it. And when they all by tacit understanding have in mind a minimum price it will result in more or less uniformity at or about that price, with now and then a sale below, and more often a sale above that price. But there will generally be enough variation to enable them "to point with pride and confidence" to the lack of uniformity, and especially to the spread in prices. The spread, however, means but little, as a small sale for peculiar reasons may be made at a very high price, while a very large sale may be made at a specially low price, thus making a very considerable spread between them.

4. *A matter of special inquiry is, does the association scheme or plan bring about an abnormal and unusual relationship as to their business matters between those who are naturally competitors?*

In *United States v. American Linseed Oil Company*, 262 U. S. 371, 388, the Court said:

In *American Column & Lumber Company v. United States*, 257 U. S. 377, we considered a combination of manufacturers got up to effectuate *this new conception of confidence and competition* and held it within the inhibi-

tion of the Sherman Act *because of inevitable tendency to destroy real competition, as long understood, and thereby restrain trade.* Our conclusion there can not be reconciled with the somewhat earlier opinion and judgment of the court below. They are in direct conflict.

The Sherman Act was intended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies *and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain.* “The statute did not forbid or restrain the power to make normal and useful contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose * * * The words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect.” *United States v. American Tobacco Company*, 221 U. S. 106, 179, 180; *Ramsay v. Associated Bill Posters*, 260 U. S. 501; *Federal Trade Commission v. Sinclair Refining Company*, 261 U. S. 463.

Certain it is that the defendants are associated in a new form of combination and are resorting to methods which are not normal. If, looking at the entire contract by which they are bound

together, in the light of what has been done under it the court can see that its necessary tendency is to suppress competition in trade between the States, the combination must be declared unlawful. That such is its tendency, we think, must be affirmed. To decide otherwise would be wholly inconsistent with the conclusion reached in *American Column & Lumber Company v. United States*, supra.

And again (p. 390):

We are not called upon to say just when or how far competitors may reveal to each other the details of their affairs. In the absence of a purpose to monopolize or the compulsion that results from contract or agreement, the individual certainly may exercise great freedom; *but concerted action through combination presents a wholly different problem and is forbidden when the necessary tendency is to destroy the kind of competition to which the public has long looked for protection.* The situation here questioned is wholly unlike an exchange where dealers assemble and buy and sell openly; and the ordinary practice of reporting statistics to collectors stops far short of the practice which defendants adopted. *Their manifest purpose was to defeat the Sherman Act without subjecting themselves to its penalties.*

There the unnatural relationship was brought about by each member making an independent contract with the Armstrong Bureau; while here, as in the Hardwood case, it is consummated through an association composed of the individual defendants. And in the Hardwood case (257 U. S. 377, 410) the court in

commenting on the actions of the defendants in compiling reports of their business operations for circulation among their competitors said:

This is not the conduct of competitors, but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that if it did not stand confessed a combination to restrict production and increase prices in interstate commerce, and as therefore a direct restraint upon that commerce, as we have seen that it is, that conclusion must inevitably have been inferred from the facts which were proved.

5. *If it be not shown that the necessary effect of the scheme or plan is to restrain interstate commerce, yet its operation should be enjoined, if it be shown that it can be so used, and that it is the intent of the parties to so use it.*

If the necessary result of an agreement or the operation of a scheme be to restrain interstate commerce, it can make no difference whether the restraint was intended or not. In *United States v. Patten*, 226 U. S. 525, 543, the court said:

And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and can not be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly

produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 243; *United States v. Reading Co.*, 226 U. S. 324, 370.

And to the same effect in *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600, 612, the Court said:

But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when in this case by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.

When the intent becomes important appears from the following authorities:

In *United States v. Terminal Railroad Association*, 224 U. S. 383, 394-5, the Court said:

Whether it is a facility in aid of interstate commerce or an unreasonable restraint forbidden by the act of Congress, as construed and applied by this court in the case of *The Standard Oil Company v. The United States*,

221 U. S. 1, and *The United States v. American Tobacco Company*, 221 U. S. 106, will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about and the manner in which that control has been exerted.

And on the same subject the Court said in *United States v. Reading Company*, 226 U. S. 324, 370:

Whether a particular act, contract or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used. Of course, if the necessary result is materially to restrain trade between the States, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important.

In other words an instrument which within itself is harmless may be used for an illegal purpose. And while it will be allowed to remain in the possession of one who intends to use it for an innocent purpose, it will be taken away from him who intends to use it to accomplish an unlawful purpose.

With reference to the defendant association the Government insists first, that the inevitable effect of its operation is to affect the prices of maple flooring which is an article that moves in interstate commerce;

and second, that if the association could be so conducted that its operation would not have such an effect, yet the past history of the conduct of the members of the association, and the character of its present activities are such that no other conclusion can possibly be reached than that defendants maintain the organization for the purpose of controlling prices of maple flooring. In other words that they intend to bring to bear through this agency influences which will not permit prices to be regulated solely by the law of supply and demand.

6. *It is no defense that the defendants did not intend to violate the law, and that they filed copies of their plan with the Department of Justice and the Federal Trade Commission.*

In this case all evidence of this character is absolutely immaterial. The sole question here is whether this scheme actually restrains, or is intended to bring about a condition which in fact is a restraint upon interstate commerce.

As above quoted from *United States v. Patten*—

by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result.

And even if the illegality of the scheme or combination depends upon the intent, the inquiry is not whether they intended to violate the law, but whether they intended to bring about the condition or do the thing which in fact restrains commerce.

7. *It is no defense that some benefits may have resulted from the operation of the scheme or combination.*

In *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, it was earnestly urged upon the Court that great benefits had resulted to the public from the combination of the manufacturers of bathtubs, in that the poorer articles were kept off the market, and a purchaser received what he supposed he was buying; but the Court (p. 49) said:

Nor can they (the prohibitions of the statute) be evaded by good motives. The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts can not be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be of some good results. *United States v. Trans Missouri Freight Assn.*, 166 U. S. 290; *Armour Packing Co. v. United States*, 209 U. S. 56, 62.

8. *It is no defense that the prices of maple flooring were and are reasonable, if such be the fact.*

Such a contention was insisted upon in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, but the court (p. 293) said:

It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in pay territory were reasonable. A great many affidavits of purchasers of pipe in pay territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that, in their opinion, the prices at which pipe has been sold by defendants

have been reasonable. We do not think the issue an important one because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices had they chosen to do so.

9. *The contention that the association created "only a reasonable restraint upon interstate commerce is devoid of merit.*

This contention arises out of a misapprehension of the meaning of "the rule of reason" stated by the Chief Justice in the Standard Oil case.

Realizing that his language had been misinterpreted he clarified its meaning in the opinion handed down a few weeks later in *United States v. American Tobacco Co.*, 221 U. S. 106, in the following language:

It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held *not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable* but that the duty to interpret which inevitably arose from the general character of the term restraint of trade required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any move-

ment of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect (p. 179).

There can be no doubt that the court entertained the same views which were expressed by the Circuit Court of Appeals for the Sixth Circuit in the Addyston Pipe & Steel Co. case. After reviewing in detail all the authorities relied upon by the defendants, wherein it had been held that the contracts in question were reasonable and not in restraint of trade, that court said:

For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought, or (4) to the legitimate ends of

the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employee of the confidential knowledge acquired in such business. (Citing authorities.)

It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; *but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.* (85 Fed. 281, 282.)

In other words whether a restraint is reasonable or not depends upon the character of the agreement or agency that brings it about, and not upon the extent of the restraint. Is the agency an unusual and abnormal one? If so the restraint is unreasonable and unlawful. That this is especially so with reference to restraints arising from these open-price associations is conclusively shown by the language of the court above quoted from the opinion in the Linseed Oil case.

10. *The relief to which the Government is entitled.*

Defendants appear to insist that the association has the right to do certain things, as for instance to standardize maple flooring and maintain inspectors; and therefore that the court should specify what particular things the association can do, and so limit the injunction as to exclude such activities from its provisions. *But to comply with such contention would be for the court to undertake to construct an association for the defendants which according to the court's view would be a legitimate one.* This the court will not do, because it never can be determined in advance what the effect of a particular organization will be; and the court might authorize the formation of an association to exercise certain functions which in actual operation would result in the most serious restraint of interstate commerce. Certainly parties who have openly violated the law by creating and engaging in an unlawful combination can not invoke the agency of the court to create for them a different combination which the court might consider legitimate.

The situation here presented is quite different from the conditions existing when the acquisition of various properties by a corporation, or the merger of a number of corporations into one, have been held to constitute a monopoly or an unlawful combination in violation of the Anti-Trust Act. There the rights of property are involved, and the court will not destroy the property, but direct that it be restored to the original owners, or be so divided that

a further violation of the statute will not exist. But here no property rights are involved. There exists nothing but an agreement or combination which the defendants have entered into and in which they are engaging; and the status quo is restored and the restraints upon commerce are stopped by a simple decree declaring the agreement and combination unlawful, and inhibiting the defendants from further engaging therein, or in any combination of like character.

An unlawful conspiracy may be composed of elements each of which when considered alone is lawful. As said in *Swift v. United States*, 196 U. S. 375, 396:

The scheme *as a whole* seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges they are alleged sufficiently as elements of the scheme. *It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful.*

Defendants' contention leads to the absurd result that where each element of a conspiracy is when standing alone lawful no injunctive decree can be entered, although the conspiracy composed of these several elements may be unlawful and accomplish the most harmful results.

This question was conclusively settled in *American Column & Lumber Co. v. United States*, *supra*. There the court entered a *sweeping decree declaring the association an unlawful combination and inhibiting the defendants from engaging in any of the activities provided for by its organization*. On the hearing defendants' counsel earnestly insisted that the decree was too sweeping and that the court should specify certain things which the association could legitimately do. *The court disregarded this insistence and affirmed the decree of the court below in toto*. A petition for a rehearing was filed, in which it was again urged upon the court that a limitation should be placed upon the decree and that the defendants should not be enjoined from separately doing a number of the things prescribed by the association, but the petition was dismissed by the court.

In fact the question had been settled in the case of *Swift v. United States*, 196 U. S. 375, 401-2. A broad decree inhibiting the defendants from engaging in any of the things alleged in the bill had been entered by the court below, and it was insisted that the decree should be modified in certain particulars. The only modification directed by the court was that in one or two particulars it should be made more specific. But the court especially considered the allegations in the bill (the case had been disposed of on demurrer) wherein it was alleged that defendants had engaged in and would continue arrangements with the railroads whereby the defendants received, by means of rebates and other devices, rates less than the lawful rates for transportation,

and were exclusively to enjoy and share this unlawful advantage to the exclusion of competition and the public (p. 392). The court stated that the acts here charged, apart from the combination and the intent, might perhaps not necessarily be unlawful except for the adjective which proclaimed them so, and the court assumed for the purpose of the decision that they were not unlawful, and that the defendants severally might lawfully obtain less than the regular rates for transportation if the circumstances were not substantially similar to those for which the regular rates were fixed; but the Court said:

Whether this particular combination can be enjoined, as it is, apart from its connection with the other elements, if entered into with the intent to monopolize, as alleged, is a more delicate question. The question is how it would stand if the tenth section were the whole bill. Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law. *Commonwealth v. Peaslee*, 177 Massachusetts, 267, 272. The same distinction is recognized in cases like the present. *United States v. E. C. Knight Co.*, 156 U. S. 1, 13; *Kidd v. Pearson*, 128 U. S. 1, 23, 24. We are of opinion, however, that such a combination is within the meaning of the statute. It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation.

And even if the advantage is one which the act of 1887 permits, which is denied, perhaps inadequately, by the adjective "unlawful," still a combination to use it for the purpose prohibited by the act of 1890 justifies the adjective and takes the permission away (196 U. S. 401, 402).

For the foregoing reasons the decree of the court below should be in all things affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1924

MAPLE FLOORING MANUFACTURERS ASSO-
ciation et al.

v.

UNITED STATES OF AMERICA

No. 342

REPLY BRIEF ON BEHALF OF THE UNITED STATES

Because of the circumstances existing when the brief heretofore filed on behalf of the Government was prepared, and the short period of time before argument counsel for the Government had in their hands the brief filed for appellants, it was impossible to prepare a brief containing a reply to many questions elaborately discussed in appellants' brief. Consequently this brief has been prepared, which counsel believes presents the Government's case more fully and satisfactorily than the former one; and it is asked that it be substituted for the brief filed previous to the former arguments.

STATEMENT OF CASE

(Italics in quotations are ours, if not otherwise stated)

This is an action brought by the United States against the Maple Flooring Manufacturers Associ-

ation and its several members to enjoin an alleged violation of the Sherman Antitrust Act. The original bill was filed on March 5, 1923; and it alleges in substance that the defendants, who manufacture a very large per cent of the maple, beech, and birch flooring marketed in the United States, fix minimum prices upon such commodity, and control its production and prices in the market by the observance of provisions contained in the plan of the association, which provide for the computation and distribution among the membership of alleged average costs, being in fact agreed minimum prices, for the adoption and distribution of freight rate books, for an open price reporting plan, and for meetings of the members of the association. (Vol. I, pp. 1-12.) For the reasons fully set forth in its opinion, a decree was entered by the District Court in favor of the Government (Vol. I, pp. 52-60), wherein it was adjudged that the articles of association and activities thereunder were violative of the Antitrust Act; and it was ordered that the association be dissolved, and that the defendants and their agents be enjoined from further engaging in the practices specifically described in the bill and also in the decree. (Vol. I, pp. 60-61.) Defendants assigned errors, and prosecuted an appeal to this court.

BRIEF AND ARGUMENT

No attempt will be made to answer in detail all the questions discussed in the brief filed on behalf

of appellants. It is believed that some of those questions are not at all determinative of the case, and this brief would thereby be extended without justification to an unreasonable length. However, the case is of such importance that the material evidence bearing upon the questions regarded as vital will be both cited and freely quoted from, as the court can thereby perceive its pertinency much more readily than if required to pick it out guided by mere citations from the mass of matter in the record, much of which is not regarded of sufficient value to justify its perusal.

I

The nature and extent of the industry involved, and its control by appellants

As is customary in this character of case, an effort is made to show that the industry involved is not important in comparison with others; that it is hedged about with competition which threatens its destruction, and can be saved only by drastic and concerted action by those engaged therein; and, especially, that it is not controlled by the organization attacked.

How old the maple, beech, and birch flooring industry is does not appear from the evidence in the record. It is probably true that fifty years ago there was no such industry; but the same is true as to the manufacture of electrical appliances of all kinds, of aluminum ware, of automobiles, of many of the most important steel and iron implements,

of cement, and of numerous other industries, which together produce by far the greater bulk of the enormous commerce which now flows from State to State and into foreign countries; and every one of those industries has its competitors who are endeavoring to limit its field to as narrow boundaries as possible.

Twenty years ago there was a sufficient number engaged in the industry to form an association and choose Mr. Keehn as its secretary; and he has been acting continuously in the same capacity with like organizations down to the present time. Nor is it one of the small and insignificant industries. The table on side page 3556, page 518, Volume IV, shows the production of maple, beech, and birch flooring in the United States for the five years ending with 1922; and the production for the last year was 210,819,000 feet; and if sold for an average of \$50 per M, which is much too low as will appear from prices hereinafter set forth, the manufacturers received \$10,500,000 for their product. True this is not large when compared with the entire lumber industry; but Mr. Smith, who was from March, 1920, to some time in 1922, Assistant Secretary and Statistician of the National Lumber Manufacturers Association, names eleven associations, composed of manufacturers of rough lumber located at different parts of the United States, which then composed such National Association (Vol. I, pp. 183-184); and there must be several

other associations connected with the different branches of the lumber industry, as the defendant association is not included in the number mentioned by Mr. Smith. Apparently, therefore, each branch of the lumber industry and each of many groups of producers of rough lumber has its separate organization; and among them the appellant association is not at all insignificant.

Effort is also made to show the impossibility of defendants exercising a dominating influence over the industry by showing the enormous amount of maple timber standing in the forests, how widely it is scattered, and the great number engaged in producing maple lumber, and how easily they can convert their plants into flooring mills. In fact, the picture drawn gives an impression that is entirely false. The fact is that it is an industry which nature has practically confined to Michigan and Wisconsin; and it is dominated by appellants acting through their association.

Mr. Brush, who is Scientific Assistant of the Forest Service, testifies that in 1920 he made a special study of the wood-using industries in the State of Michigan, and that the total amount of maple lumber used by the factories in Michigan in that year was 286,363,000 board feet, of which 178,477,000 feet were used in planing-mill products; and he states that as a conservative estimate 90 or 95% of such products was flooring (Vol. I, pp. 178-180). He also says that there are two commercial kinds of maple, one hard and the other

soft; that the hard maple will stand a great deal of wear, while the soft is not so durable under conditions necessitating considerable wear; that hard maple is very largely used in the manufacture of maple flooring, soft maple not producing a flooring nearly so satisfactory; that soft maple flooring would not be able to compete successfully with flooring made of hard maple; that hard and soft maple grow together more or less, but that, as a general rule, the two together do not grow in commercial stands in large quantities; *that the "Lake States contain the principal hard maple stands in this country, namely Michigan, and to a less extent probably Wisconsin"*; that he can hardly answer the question which kind of maple predominates in the other maple-producing centers, but he knows that the soft maple is very important in New England, probably more important than the hard maple. (Vol. I, pp. 179-180.)

Mr. Franklin H. Smith, who when his deposition was taken, was in charge of the Lumber Commodity Division of the United States Tariff Commission, and who had previously been Assistant Secretary and Statistician for the National Lumber Manufacturers Association, and had also been with the Forest Service from March, 1908, until March, 1920, testified that the bulk of maple lumber is produced in the Lake States region, particularly Michigan and Wisconsin; that maple is also found in the Northeastern States—Maine, New Hampshire, Vermont, New York and Pennsylvania—and also

grows in West Virginia; that there is hard and soft maple, and that the two varieties are found together only to a slight extent; *that hard maple is found largely in Michigan and Wisconsin*; that from his work in the Forest Service he became familiar with the figures of production of lumber in various sections of the country, and that he would say *in Michigan and Wisconsin 95 to 98% of the maple cut was hard maple; and in the Northeastern States 75% of the maple cut was soft; that in West Virginia and adjoining States, so far as applicable to the Appalachian region, possibly 60% was hard and 40% soft; that maple was produced in minor or limited quantities in the Mississippi Valley and in fact in all of the hardwood producing States, of which in his judgment 75% was soft and 25% hard; that he would say that a large percentage of the maple produced in Michigan and Wisconsin is converted into flooring; that probably 90% of the maple utilized by planing mills was for the production of flooring, and that he thinks he has kept in close enough touch with the conditions to state that the percentages mentioned still hold good.* (Vol. I, pp. 186-188.) And with reference to the relative value of hard and soft maple flooring, and where the industry is concentrated, he testifies:

Q. Which of the two species of maple that you have mentioned is suited to manufacture maple flooring?

A. Hard maple, because of its hardness of texture and wear resisting qualities.

Q. Is soft maple used, too, for the manufacture of maple flooring at all?

A. If it is so used, it would be used only in isolated cases.

Q. Where is the maple flooring industry in this country centered?

A. In Michigan. (Vol. I, p. 188.)

With but three exceptions the plants of the defendant corporations are located in the States of Michigan and Wisconsin. Some time before the hearing the defendants took the deposition of Edward B. Gordon, who is on the Research Staff of the Bureau of Business Research of Harvard University; and Mr. Gordon testified that from Hendricks' Commercial Register, the only source of information he could find upon the subject, he took a list of those engaged in the manufacture of maple, beech, and birch flooring whose names did not appear in a list prepared by Mr. Keehn, the secretary of the association; and the two lists, one prepared by Mr. Keehn and the other by Mr. Gordon, which together purport to show the nonmembers of the association engaged in the business, were filed as Exhibits 1 and 2 to Mr. Gordon's deposition. (Vol. II, pp. 626-7.) To secure accurate data as to the production of such flooring in Michigan and Wisconsin the Government subpoenaed representatives of the several manufacturers appearing upon these lists whose factories are located in those states. And there appears in the record, either by way of evidence given by such representatives or by stipu-

lation, the quantity of flooring produced for the years 1918-1922, inclusive, by such manufacturers. See Vol. I, pp. 83-88, 91-94, 96-98, 119-120, 137, and 140-142. From the data thus obtained and that contained in the barometers issued by the association, which show the amount of flooring produced by the members of the association, and information obtained from other manufacturers appearing in the lists filed by Mr. Gordon in response to questionnaires sent out by the Department of Justice, Mr. Hughes, an agent for the Government, computed the amount produced by members of the association and by nonmembers respectively, and the percentage produced by the members, and filed as Government Exhibit 68 a statement showing the result of his calculation. (Vol. II, pp. 798-802.) His calculations appear in Vol. IV, p. 518, side pp. 3553-3708, a number of side pages not being printed. Without going into details, it appears from these estimates that the percentage of production of maple, beech, and birch flooring in the United States by members of the association for the years mentioned is as follows: 1918, 78.1%; 1919, 78.9%; 1920, 75.2%; 1921, 71.0%; and 1922, 70.0%. Average for the five years 74.2%. (Side p. 3556.)

In Michigan the production of members was: 1918, 96%; 1919, 94%; 1920, 92%; 1921, 92%; and 1922, 92%. Average, 93%. (Side p. 3553.)

In Wisconsin the percentages produced by the members were: 1918, 47%; 1919, 70%; 1920, 42%;

1921, 31% ; and 1922, 49%. Average 50.8%. (Side p. 3554.)

The production in Michigan is so much greater than that in Wisconsin that the percentages of production by the members in the two states were: 1918, 91.6% ; 1919, 89.3% ; 1920, 85.6% ; 1921, 82.7% ; and 1922, 82.8%. Average, 85.8%. (Side p. 3555.)

Mr. Hughes' estimates show the quantities produced in each of the several states. The defendants filed as Exhibit CC a list which also shows the production by nonmembers by states. (Vol. IV, pp. 831-833.) A comparison of the estimates will show no great difference, the defendants' tables more generally showing less production by nonmembers than the estimates made by Mr. Hughes.

In the petition filed by the association in 1915 with the Federal Trade Commission it was said that the members of the association "represent about seventy per cent of the industry." (Vol. III, p. 76.)

A petition to the President of the United States with reference to the Canadian duty on flooring, which was incorporated in the Minutes of the Meeting held March 22, 1923, stated that the members of the Association produce about seventy per cent of all Maple, Beech, and Birch flooring manufactured in the United States (Vol. IV, p. 507) ; and in the answer to a questionnaire sent out by the Department of Commerce, which was incorporated in the Minutes of the General Meeting held April

20, 1922, it was stated that *the members of the Association represent about 70% of the productive capacity of the industry.* (Vol. III, p. 166.)

These figures are conclusive evidence that the industry is wholly dominated by the association.

In the case of *American Column & Lumber Co. v. United States*, 257 U. S. 357, known as the Hardwood case, the association members produced only about one-third of the entire product for the United States. And they had competitors scattered all over the country, while for the reason above shown appellants can never have serious competition from other sections.

II

Former articles of association under which manufacturers of maple and beech flooring operated before the adoption of the present articles

The manufacturers of maple, beech, and birch flooring have operated under a number of articles of association; but the membership of each organization has been composed largely of the same manufacturers; and a large majority of the defendants have been continually members.

A short review of previous articles of association and of the activities thereunder will be helpful in determining the purposes of the present association and the results accomplished by it.

So far as the record shows the first association was organized in 1905, with headquarters in Chicago. The members of that and subsequent as-

sociations manufactured maple, beech, and birch flooring, and some of them also manufactured oak flooring. The association of 1905 continued until 1907 or 1908, when it was succeeded by another association, the articles of which expired about 1909. That association was succeeded by another which lasted until either 1911 or the fall of 1912, when a successor was organized. The articles of that association bear date as of January 1, 1913, and are filed as Government Exhibit 1, being the first articles of association introduced. (Keehn, Vol. I, p. 72.)

There are twenty-two manufacturing companies who are made defendants, and they constitute the membership of the present association. Of these twenty-two members *sixteen were members of the association which began to function January 1, 1913.* There were thirty members of that association. (Keehn, Vol. I, p. 73.) Among other objects mentioned in those articles were "to exchange information; to collect and disseminate statistics concerning the flooring industry." The officers and their duties, and the meetings specified, were substantially the same as those provided for in the present articles of association, which will be hereafter fully described.

Allotment plan

A special fund was provided for by those articles, which was deposited as a guaranty that the member would carry out all of its obligations; and if it failed

to do so its share of the special fund was forfeited. (Vol. III, p. 5.) There was also created a general fund; and for the purpose of securing moneys for that fund an assessment of \$3 per M feet was levied each month on "*all shipments during that month in excess of the allotted percentage set opposite the signature of each member*"; and it was provided that from such fund each member who had shipped during the month less than its allotted percentage should be paid \$3 per M feet on the quantity under-shipped down to 75% of its allotment; and if a member shipped less than 75% of its allotment during any one month, it should receive \$3 per M on the deficit down to 75% of its allotment, and that the balance should be held until the end of the year; and if at the end of the year it had shipped 75% of its allotment for the year it would be paid the balance, but if it had failed to ship as much as 75% of the allotment the amount retained would belong to the Association. (Vol. III, p. 6.)

It was provided that each assessment for that fund should be paid within five days after the assessment had been made and notice given; and if any member failed to pay his assessment within thirty days the trustee should draw upon the member's share of the Special Fund; and if the amount was not restored to the Special Fund by the member within ten days after notice he should cease to be a member of the Association, and should forfeit all interest in both the special and general fund.

(Vol. III, p. 6.) It was further provided *that daily reports should be made by each member of the association to the secretary at the close of business of all deliveries and shipments of all kinds of maple, beech, and birch flooring for use within the United States, except that purchased from other members; and it was specified what such reports should include.* (Vol. III, p. 7.)

As there was then no provision for the distribution of such information, the object of the requirement no doubt was to enable the secretary to make estimates of assessments and payments under the allotment provision.

These articles of association were continued with a few modifications for three additional years until January 1, 1919. (Keehn, Vol. I, pp. 74-75.) The articles in effect during that period are filed as Government Exhibit 2 (Vol. III, pp. 14-21). *Of the twenty-two members of the present association seventeen were members during the existence of those articles of association, the membership then being twenty-eight.* (Keehn, Vol. I, p. 75.) Those articles were succeeded by another set, which went into effect on January 1, 1919, and continued for six months, or until July 1, 1919. Those articles are filed as Government Exhibit 3. (Vol. III, pp. 25-32.) They contain precisely the same provisions as to allotment and statistical reports as those contained in the preceding articles (Vol. III, pp. 30-31), but a different method was provided for raising the special fund (Vol. III, p. 29). *Twenty-one*

members of the present association were members of that association, which consisted of twenty-nine members. (Keehn, Vol. I, p. 76.) Other articles of association were adopted and went into effect July 1, 1919, to be effective until July 1, 1922 (Vol. III, pp. 37-44). But Mr. Keehn testifies that the allotment feature was discontinued on March 31, 1920, and that there has been no general fund or allotment payments since that date. But, strange to say, there was no minute made by the association or by the board of trustees showing such fact.

On being questioned by the court, the witness claimed that they took this action on advice of counsel, but admitted that he thought there was nothing in the minutes to show such fact. (Vol. I, pp. 76-78.) Instead of the articles adopted July 1, 1919, being continued to July 1, 1922, as was contemplated, the articles now in effect were adopted in March, 1922, but were dated back as effective January 1, 1922. In the meantime, however, a draft of articles was made, and was signed by a large number of the manufacturers, which purported to extend over the period from October 1, 1921, to July 1, 1922 (Gov. Ex. 5, Vol. III, pp. 49-56); but Keehn says that they did not go into effect because not signed by three or four of the manufacturers (Vol. I, pp. 78-90). Although Keehn says that the allotment feature was discontinued March 31, 1920, *yet it will be noted that in this tentative draft that feature was retained;* but instead of three dollars per thousand on excess

shipments, and payment of the same amount on undershipments, the amount to be collected and paid was four dollars per thousand. (Vol. III, pp. 54-55.) If all but three or four of the members were willing to sign articles containing such an agreement to extend from October 1, 1921, to July 1, 1922, it can hardly be believed that the allotment feature ceased on March 1, 1920, especially in view of the fact that no record of any such action was made.

The fact appears to be that for some reason not disclosed by the record, the operation of the allotment articles was *suspended* for a period of 18 months from March 31, 1920, until October 1, 1921, so far as the collection and distribution of the General Fund was concerned. This is established by a number of letters in the record. In a letter from William Horner to Mr. Keehn dated Nov. 22, 1920, eight months after it is claimed the allotment feature was abandoned, the writer said:

We note by your report of the General Meeting that you do not mention the resolution regarding the allotment plan at all. Please advise us by early mail, if you intend to put the allotment plan into force immediately or if this is to be held in abeyance for the present. (Vol. IV, p 560.)

Mr. Keehn's answer dated November 29, 1920, said:

The question of resuming the allotment payments, *which have been held in abeyance*

since March 31st, will be taken up by correspondence with the Trustees and the entire membership in time so that some definite action can be taken at the next general meeting to be held on December 22d. (Vol. IV, p. 560.)

But another letter from Mr. Keehn to William Horner dated December 31, 1920, shows that the meeting on the 22d was a "mixed-up mess", and that nothing was accomplished. (Vol. IV, pp. 560-561.) Apparently nothing more was done about the matter until the proposed Articles of Association dated October 1, 1921, were under consideration, when under date of September 16, 1921, Mr. Keehn sent to each member a copy of the proposed revised articles, stated the changes incorporated in them, and in explanation of the allotment articles said:

It would seem that the allotments as agreed upon in our present Articles of Association, which allotments were to be in force from July 1, 1919, to July 1, 1922, should govern from October 1, 1921, to July 1, 1922, because each member has already agreed to his allotment to run to July 1, 1922, and if we begin changing allotments, there will be no end to it. *Inasmuch as the allotments were suspended from April 1, 1920, to October 1, 1921, a period of 18 months or one-half of the three-year period originally agreed upon, there should be no particular hardship on any member to reinstate his allot-*

ment from October 1, 1921, to July 1, 1922, being the nine months remaining of the three years originally agreed upon. (Vol. III, p. 61.)

The proposed Articles of Association of October 1, 1921, apparently did not actually go into effect because of the refusal of the Nichols & Cox Lumber Company and of the Holt Hardwood Company to join with the other members who had expressed themselves in favor of reinstating the allotment feature, unless their allotted ratios in M feet were readjusted to be in harmony with the volume of their production and shipments during a more recent period than the one used in basing their allotted percentages. (Vol. III p. 63.) In one respect, however, the allotment feature of the July 1, 1919, Articles of Association was actively in force and *enforced* until the present Articles of Association were adopted. Article XVI of these articles provided that:

An Expense Fund to provide for the current running expenses of the Association shall be established and maintained by the payment, as often as required by the Board of Trustees, of assessments levied upon the members of the Association of Twenty-Five (\$25.00) Dollars per each one (1%) per cent. allotted to each member under these Articles of Association (Vol. III, p. 43.)

The Special Fund or Guarantee Fund established by Article XIII of the 1919 Articles was also

based on the allotted established percentages, and no change was made in the Special Fund or in the method of providing for the current running expenses of the Association, except in the case of one new member, until the 1922 Articles were adopted. (Vol. IV, pp. 481-482.)

Therefore, if in fact the collection and paying out of the allotment fund ceased on March 1, 1920, defendants deserve no credit so far as this proceeding is concerned, as it was not done that their conduct might conform to the law; *but it was a mere temporary suspension arising out of the general conditions of the lumber business.*

The provisions relating to determining average cost appeared for the first time in the proposed Articles of October 1, 1921, in practically the same form as in the Articles under which the Association is now operating. It was declared that the principles stated were recognized *and adopted* as the only scientific method of conducting the business of manufacturing and marketing Maple, Beech, and Birch flooring. (Vol. III, pp. 53-54.) This feature will be fully considered hereafter.

There was an effort on the part of the witness Keehn, who is secretary of the defendant association, to make it appear that an entirely different association operated under each one of the plans above described; but he was forced to admit that he was the secretary of all the associations; that each one functioned until the articles of its successor

were adopted; and he did not deny that the office was continued at the same place; and, as above shown, nearly all the members of the present association were members of each one of its predecessors. (Keehn, Vol. I, pp. 73-76.) The continuity of these associations is also undisputably shown in Keehn's cross-examination. (Vol. I, p. 143.)

III

Minimum Price Plan and Minimum Price Basis

The Minimum Price Plan

In addition to the articles of association above described, on August 27, 1915 (Gov. Ex. 10, Vol. III, pp. 76-78), a petition dated July 14, 1915, was filed with the Federal Trade Commission, and on June 27, 1916, an agreement between the petitioners designated as a "Minimum Price Plan," to which a copy of the petition was attached, was also filed with the Commission. (Vol. III, pp. 78-81 and Vol. IV, p. 798.) The signatures of twenty-eight manufacturers were attached to the petition, and the signatures of twenty-three were attached to the plan. *Fourteen of the defendants signed both the petition and the plan.* The plan provided for an amendment to the articles of association, to be operative from July 1, 1916, to November 1, 1917; and Article I of the proposed amendment provided that:

Pursuant to the petition dated July 14, 1915, which the Maple Flooring Manufacturers' Association submitted to the Federal

Trade Commission at Washington, D. C., on or about the 27th day of August, 1915 (a copy of which petition follows this supplemental agreement), the members of the Maple Flooring Manufacturers' Association *hereby agree to establish minimum prices for the sale of Maple, Beech, and Birch Flooring, and agree not to sell any Maple, Beech, or Birch Flooring during the period beginning July 1, 1916, and ending November 1, 1917, below such minimum prices.* (Vol. III, p. 78.)

Article II provided that in order that the minimum prices might be fair and reasonable, the actual average cost of flooring should be determined by the following elements, to wit:

(a) The actual market value of the raw material;

(b) The average cost and expense of manufacturing and selling flooring;

(c) Interest on the capital actually invested in the flooring business at the rate of five (5) per centum per annum;

(d) Annual depreciation of Plant; and

(e) The usual overhead charges incurred in carrying on the flooring business. (Vol. III, pp. 78-79.)

Article III provided that *minimum prices should from time to time be established under the agreement, but that they should not exceed an amount which would give the member an average net profit, over the average actual cost to be determined, in excess of ten per cent.*

By Article IV a scale of minimum prices to be observed until altered was established.

By Article V the members were prohibited from selling during the period mentioned flooring at less than the minimum prices established, or to be established, and it was provided that if any member should sell for less than the minimum price, it should pay to the association a sum equal to 10% of the amount received for the flooring so sold.

By Article VI each member was required upon the request of the secretary to furnish a report showing its sales and to whom, and the prices at which made; and the secretary was given the right to examine the records of the members.

Article VII provided that if a member had on hand flooring which it was unable to market at the minimum price, or to any other member of the association without regard to such price, it should offer the flooring to the members through the secretary; and in case it was bought by a member, it should not be resold by the purchaser at a price less than the minimum; but if not bought by some member within thirty days, then the owner might sell the flooring in open market at any price, not less than the price at which he offered it to the members of the association; and that if a member should violate such provision he should pay the association a sum equal to 10% of the amount received for the flooring.

Article VIII provided that if a member did not pay the 10%, the secretary should cause the same to

be paid from any funds standing to the credit of such member. The agreement was made with the understanding that it should be signed by all the members, and that it should be filed with the Federal Trade Commission. (Vol. III, pp. 78-81.) The petition was attached to copies of different plans, and appears in the record [1] Vol. III, pp. 76-78; [2] pp. 82-84; [3] pp. 89-91; and [4] pp. 95-97.

As stated in the following paragraph from the report of the Market Conditions Committee (the functions of which committee are explained hereafter on p. 139) dated June 22, 1916, the Minimum Price Plan Agreement was finally signed by all the members, and became effective from July 1, 1916, until November 1, 1917:

The Special Committee is indeed happy to report that Mr. I. N. Bushong, of the Northwestern Cooperage & Lumber Company, attended the meeting and signed the Minimum Price Plan Agreement in behalf of his company. *The Minimum Price Plan Agreement is, therefore, consummated, and will take effect July 1st, 1916, as telegraphed yesterday.* The duration of the agreement is from July 1, 1916, to November 1, 1917. As the time between now and July 1st is quite short, and as members may have quotations out which they may not hear from before July 1st, it is understood that any bona fide outstanding quotations may be protected up to July 10th. (Vol. IV, p. 430.)

Even at the time they first adopted and operated under the Minimum Price Plan, some of the defendants were rather uncertain as to its legality; or perhaps quite certain as to its illegality. Under date of September 1, 1916, the East Jordan Lumber Company advised Mr. Keehn that in the opinion of their attorneys the plan was in direct violation of the Federal Statutes and also of the Michigan Statutes (Vol. IV, pp. 545-546); but this difficulty was ingeniously answered by Mr. Keehn in his reply dated September 7, 1916, part of which reads as follows:

Replying to your letter of the 1st, the submission of the Minimum Price Plan to the Federal Trade Commission takes care of all legal questions pending the reply of the Commission, and if the Commission decides that the Plan is not legal, they will, no doubt, tell us to discontinue its operation.

When the Plan was under consideration, the Association requested its attorney, Mr. Newman, to handle the legal details, and it was understood that the members of the Association would leave it to him instead of each member consulting his own attorney. If all the members submitted all Association questions to their attorneys we would have such a diversity of opinion that nothing could be accomplished, and for that reason it has been an advantage to the Association to have an able attorney like Mr. Newman to advise us.

Inasmuch as the Minimum Price Plan is an amendment to the Articles of Association, and is consequently now a part of that contract, all I can do, it seems to me, is to send a copy of your letter to the Board of Trustees. (Vol. IV, p. 546.)

Mr. Keehn's letter of September 7, 1916, also shows that the problem had been presented by the Wisconsin members of making the affidavit required by the laws of that State in answer to the question "whether such corporation has entered into any combination, conspiracy, trust, pool, agreement, or contract," etc.; and although Mr. Keehn first stated in a letter dated January 17, 1917, that the affidavit could not be signed while a corporation was a party to the Minimum Price Plan, this difficulty was also solved; and under date of February 7, 1917, Mr. Keehn advised the Foster-Latimer Lumber Company that inasmuch as the Association had never received the approval of the Federal Trade Commission to the Minimum Price Plan, and as the matter was still pending, the Plan had never been consummated and had never been in effect. The Foster-Latimer Company nevertheless made its report to the State with the notation: "We are members of Maple Flooring Manufacturers Association and all matters pertaining to that organization are submitted to Federal Trade Commission." (Vol. IV, pp. 546-548.)

The original Minimum Price Plan was extended from November 1, 1917, to January 1, 1919, to run

concurrent with the duration of the allotment articles, by a resolution adopted at the meeting held July 20, 1917, in accordance with a recommendation of the Market Conditions Committee. (Vol. IV, pp. 436-437.)

In a letter to members dated October 14, 1918, Mr. Keehn stated that the allotment contract and Minimum Price Plan would both expire by limitation on December 31; and he made the following suggestions as to the renewal of the Plan:

6. The M. P. P. to be rewritten to include all modifications adopted to date and its duration to run concurrent with the Allotment Articles.

It would be my thought not to incorporate the Allotment Articles and the M. P. P. in one document, but to have the M. P. P. supplemental to the Allotment Contract as at present, so in case the Federal Trade Commission should advise the cancellation of the M. P. P. it can be done without disturbing the Allotment Contract or vice versa. (Vol. IV, p. 444.)

The plan was accordingly revised as of January 1, 1919, to be in effect from January 1 to July 1 of that year; and it was recited that the revised plan was made pursuant to the petition filed with the Federal Trade Commission on July 14, 1915. (Vol. III, p. 84.) This plan contained the same provisions as the former, with the addition that each member might register special representatives;

who were required to be wholesalers or commissioned salesmen, and whose registration should be confidential, and that a concession of one dollar per thousand might be made to such representatives; and further, that a list of wholesalers and commission men should be adopted to whom a like concession might be made as soon as such list had been published to all the members of the association; and that nominations for registration should be made in writing to the secretary by members of the association, and all nominations should be bulletined to the members by the secretary; and if no objections were filed within ten days the registration should automatically become valid. Thus a favored class of dealers was provided for. (Vol. III, pp. 88-89.)

The Minimum Price Plan was continued after July 1, 1919, and was finally vacated by the following resolution adopted at the Annual Meeting held February 12, 1920:

M. P. P. Vacated.—On motion, the following resolution was adopted by unanimous vote:

“Whereas the Minimum Price Plan was submitted to the Federal Trade Commission for its approval on June 27, 1916, and the Commission has taken no action with respect to the same, neither approving nor disapproving the Plan; and

“Whereas said Plan has never been enforced by the Association;

“ *Therefore be it resolved, That said Minimum Price Plan and all resolutions relating to the same, be and they are hereby vacated.*”
(Vol. IV, p. 529.)

This action was undoubtedly taken because recommendations or agreements as to *minimum* prices were a futility in February, 1920, as the annual report of the Secretary which was read at the meeting before the resolution quoted above was adopted, *commented at length upon conditions in the industry, and then stated that the time was rapidly approaching, if it had not arrived, when concerted action should be taken by the Association to stabilize the price of flooring, and that maximum prices could be established from time to time.* At the same meeting, however, the Association adopted the resolution instituting the weekly sales reports which is quoted hereinafter (p. 107), and also the following resolution:

New Table of Values.—On motion, the Secretary was instructed to compile for the information of the members *a Table of Values showing what the selling prices of flooring should be* if based scientifically upon actual average cost and if a profit is included of 10% reckoned upon selling prices F. O. B. the flooring mill.

It was the sense of the meeting that the following fundamental elements constitute the basis of cost in ascertaining what the selling prices of flooring should be:

(a) The actual market value of the raw material.

(b) The average cost and expense of manufacturing and selling flooring.

(c) Interest on the capital actually invested in the flooring business at the rate of five (5) per centum per annum.

(d) Annual depreciation of Plant; and

(e) The usual overhead charges incurred in carrying on the flooring business. (Vol. IV, pp. 528-529.)

Conditions in the industry during the latter part of 1920 were not as favorable for the manufacturers as they had been in February; and under date of December 16, 1920, Mr. Thomas, the Chairman of the Market Conditions Committee, wrote to Mr. Keehn saying:

From present indications I assume that there will be an insistent demand for the resumption of our M. P. P. at the time of our next meeting, December 22. It seems to me desirable to work out an adjustment of the plan so it can be put into effect the first of the year providing the members all agree to it. (Vol III, p. 97.)

The Minimum Price Basis

Then on January 6, 1921, a plan, known as the "Minimum Price Basis," was adopted, which was to be effective from that date to July 1, 1922. This purported also to be based upon the petition filed with the Federal Trade Commission on July 14, 1915; and it was stipulated that "the members of

the Maple Flooring Manufacturers' Association hereby establish a Minimum Price Basis for the sale of maple, beech, and birch flooring." (Vol. III, p. 92.) The elements which entered into the computation of cost were the same as in the former stipulation, except the interest allowed was 6% on capital invested instead of 5%, and it was declared the *minimum price* should not give a member an average net profit in excess of 5%, instead of 10% as specified in the former agreement. (Vol. III, pp. 92-93.) *A table of values was agreed upon, subject to change; and it was stipulated how much commission might be allowed each member's special representatives and also the amount allowed those registered as wholesalers and commission men, and what the terms of sale should be.* The only difference between this plan and the "minimum price plans" previously adopted was, that this one did not prescribe a penalty for violation, or specify a method to enforce its observance. It was recited that the plan should be filed with the Federal Trade Commission for its approval, and that *in the event of its disapproval* it should be void. Of course, the Commission expressed no opinion upon the subject, and by its very terms it became effective. This plan was signed by twenty-three manufacturers, *of whom eighteen are defendants in this litigation.* (Vol. III, pp. 92-94.)

Both the M. P. Plan and M. P. Basis were in force

It was first claimed by the witness Keehn that neither the Minimum Price Plan nor the Minimum Price Basis ever went into effect; and when shown the Plan revised as of January 1, 1919, and asked "Did that go into effect on that date?" he replied, "No minimum price ever was enforced or was consummated." (Vol. I, p. 80.) Later, on cross-examination, he made a distinction between the plans being "in force" and "enforced," and testified:

Q. When you said in your direct examination that it was never enforced will you explain just what you mean by that? What was done by the association then existing under this minimum price plan, government exhibit 11, if anything?

A. Some of the statistical data and lists of surplus stock, etc., were submitted to the association, but no penalties or fines or assessments of any kind were ever made upon or claimed for or ever paid into the general fund or the treasury of the association or were demanded by the association. In other words, the members continued on and so far as my judgment and opinion goes they sold their flooring at whatever prices they pleased. (Vol. I, p. 144.)

His attention was called to a recital in the minutes of a meeting held January 6, 1921, as follows:

The committee then made its report and the plan as formulated to be known as the

minimum price basis was read and fully discussed by the meeting, *and on motion was accepted*;

and the witness drew a distinction between "accepted" and "adopted" (Vol. I, p. 148), as he had previously done between its being "in force" and "enforced" (p. 146).

That the Minimum Price Plan was "in force," and at least in a measure "enforced," ever since it was first devised is shown by many of the exhibits introduced by the Government. Exhibit 31 M (Vol. III, side p. 533) is a page dated July 1, 1916, entitled "*Application of Minimum Prices*," which was combined with the Table of Values of May 15, 1916, and which reads as follows:

The Delivered Prices in the Table of Values of May 15, 1916, in the Association Rate Book and Index of Towns, *are the basis of the Minimum Prices*—not F. O. B. mill prices.

Minimum Prices of 1 $\frac{1}{8}$ "', 1 $\frac{5}{8}$ "', and 1 $\frac{1}{2}$ "' Maple, Beech, and Birch Flooring are based on the Rate Book Full List Delivered Prices of $\frac{1}{2}$ "' D. & M. Maple.

Minimum Prices of $\frac{1}{2}$ "' Jointed Flooring are based on the Rate Book Full List Delivered Prices of $\frac{1}{2}$ "' D. & M. Maple.

Prices of 2 $\frac{1}{2}$ "' face D. & M. or Jointed are based on 2 $\frac{1}{4}$ "' face D. & M.

Prices of 3" or wider faces D. & M. or Jointed are based on 3 $\frac{1}{4}$ "' face D. & M.

A Minimum Price is the bottom price, not an average price.

Don't stay at the bottom.

When your stock conditions and sales opportunities will not warrant your holding for top prices, insist at least on getting a substantial advance over the Minimum Price.

That some at least of the members did not ignore their agreement to maintain the minimum prices (which were apparently also the actual current selling prices) is shown by a letter from the Bigelow-Cooper Company to Mr. Keehn, *which the latter circularized to all the members under date of September 14, 1916, and which reads in part as follows:*

We received the following letter from our New England salesman, which we thought would interest you:

"I was very much surprised this morning in trying to secure an order from Blacker & Shepard Co. for a carload of 13/16 x 2 1/4" No. 1 Maple flooring, *that I was the only one quoting on new basis of prices * * ** I did not get the names of any of the concerns bidding, but it surprised me to think that not one of them was over \$41.00, whereas our quotation was \$42.50."

The writer does not know of six concerns quoting in Boston Territory who are outside of the Association. It would look as though all your good members are not sticking. *We are continuing, however, to ask the prices.* (Vol. IV, p. 431.)

Actions taken by the Association to establish new minimum prices or new spreads in accordance

with Articles II and IV of the Plan, are shown by the January 26, 1917, Table of M. P. P. Values (Vol. III, p. 245); the minutes of the meeting held July 20, 1917 (Vol. IV, pp. 434-435); the letter to members dated May 23, 1918 (Vol. III, p. 299); the Market Conditions Committee Report dated June, 1919 (Vol. III, p. 246); and the Market Conditions Committee Report dated August 21, 1919 (Vol. III, p. 249). A report entitled "Listings of M. P. P. Surplus Stocks" illustrates the method of operating under Article VII of the Plan. (Vol. III, pp. 256-260.) The June, 1919, Report illustrates in detail the method of determining and establishing minimum prices and is therefore quoted at length:

Current Net Values.—Current Net Values for June reflect the advance adopted in May, but as the advance adopted in June did not take effect until June 19th, with the customary ten days in which to protect outstanding quotations, it was not to be expected that a large volume of new orders would be booked in June at the new June prices. Current Net Values for July, however, will reflect the June 19th M. P. P. Basis.

Survey of Costs.—Surveys of Costs for the 2nd quarter of 1919 were received from ten members whose flooring operations are typical of the average of the industry. Their reports indicate an advance in Manufacturing and Marketing Costs of \$1.29 over

the previous survey. The gross cost is \$22.14 less wood \$2.22, leaving the net cost \$19.92 compared with \$18.63, according to the preceding survey. The market value of rough flooring lumber has also advanced. The Committee felt that it should be conservative and that it would be better to be too low than too high regarding the average current market value of lower Michigan, upper Michigan and Wisconsin 4/4 Maple Flooring stock. Based upon information regarding recent sales, not asking prices, the Committee concluded that \$3.00 would represent the advance on the flooring lumber. This would equal \$3.66 advance in the cost of 1,000 ft. of flooring (counting 18% waste) in arriving at the selling basis of the product. Using the composite results of the seven test runs, as per our revised statement of May 15, 1919, it works out as follows:

Cost of 1,000 ft. flooring sold.....	\$56.34	
To cover \$3.00 advance on flooring lumber, counting 18% waste. Add..	3.06	
Add Increase in Manufacturing and Marketing Costs from \$18.63 to \$19.92	1.29	
	<hr/>	\$61.29
Add one-ninth to give 10% profit on sales....	6.81	
	<hr/>	\$68.10
Value of Seven Test Run flooring prod- uct per statement of May 15th....	\$58.98	
Add advance of June 19th.....	6.00	
	<hr/>	64.98
Horizontal advance required.....	3.12	
	<hr/>	68.10

Committee's Recommendations.—In view of cost conditions the Market Conditions Committee recommended a horizontal ad-

vance of \$3.00 and the recommendation was immediately telegraphed to all the other members of the Association as follows:

“ Because of increased costs Market Conditions Committee recommends horizontal advance of Three (\$3.00) Dollars effective today. Please wire approval today.”

At this writing we have received affirmative replies from all but one member of the Association, and we are expecting to hear from him during the day.

Some of the replies which we quote below favored a larger advance than \$3.00. (Vol. III, pp. 246-247.)

After quoting some of the replies favoring a larger advance the Report continued:

So, if any members of the Association feel that the recommendation of the Committee is too low or is at a lower basis than they wish to take new orders at, they can, of course, pursue the same course and ask more than this new M. P. P. Basis.

It should always be remembered that the M. P. P. is a minimum price not a maximum price.

Values of 3".—The Committee discussed the market value of 3" flooring, which is also oversold to a greater extent than ever before in the records of the Association, especially the Clear grade. It was the view of the Committee that a horizontal advance of \$5.00 on 3" Clear and No. 1 be recommended, and

the Secretary was instructed to have a new Table of Values covering the 3'' printed and mailed to the members. Please bear in mind that the 3'' prices do not carry any concession, but are net, being subject only to commissions to your Registered Special Representatives and to Registered Wholesalers and Commission Men. (Vol. III, p. 248.)

The appellants' brief quotes on pp. 197-204 a number of statements by witnesses in support of the assertion on p. 196 that the evidence "clearly proves that the Minimum Price plans were abandoned and never enforced." None of the statements quoted, however, in any way controverts the evidence heretofore considered, which establishes beyond dispute that the original Minimum Price Plan was continued from time to time from 1916 to January, 1919; that in January, 1919, it was revised and readopted and was in effect until early in 1920 when the high level of prices made its continuance unnecessary; and that the Minimum Price Basis was signed and put into effect in January, 1921, when the general business depression again made the establishment of minimum prices desirable. The greatest effect that could be allowed the evidence quoted is that during the operation of the Plans, some of the parties to them perhaps did not always live up to their signed agreements, and that the prescribed penalties were not collected for such lapses. However, some of the evidence quoted with reference to that question merely indicates

that there was no absolute *uniformity* of prices—which of course was never required under the plans.

Everything prescribed by the Minimum Price Plans and Minimum Price Basis—except possibly enforcing the observance of the former—was, however, regularly done; and it appears from the following statement made by Mr. DeWitt while attempting to establish the nonobservance of his minimum price agreements, that the prices established in accordance with the plans were at least considered to be *the association prices*. He said:

* * * and our actions show that we never have considered ourselves bound. If you will go through all our files and get the prices that we have obtained for our flooring you will find that it has always varied, sometimes it will be the Association price, sometimes lower and sometimes higher, but we have never surrendered the right to make our own prices on our product. (Vol. I, p. 258.)

At least one member of the association, however, did not violate the Minimum Price agreements, as Mr. Saunders testified on cross examination:

A. At any time during the life of any of these Associations had our prices been below that price, we might have considered it, but it never being necessary it never came to our attention.

Q. That is your explanation, that you always sold above the minimum price, and hence you did not consider the minimum price?

A. That is correct.

Q. Always sold above it?

A. I think that is correct, I think our history will show it. (Vol. I, p. 203.)

No reports of individual sales were furnished to the members by the association during the life of the Minimum Price Plan, *but while the Minimum Price Basis of January 6, 1921, was in force the regular weekly sales reports were being prepared and distributed.* Exhibits 20, 20A, 21, and 22 (Vol. III, pp. 261-76) are the reports dated January 13, January 20, January 27, and February 3, 1921. Each report gives in successive columns from left to right the date of the sale, the quantity, the dimension, the grade and wood, the delivered price, the new index letters (freight rate symbols), the M. P. B. (the Minimum Price Basis delivered price), the commission, and the identification number of the mill, except that there are not in all cases M. P. B. prices to compare with the actual prices. A tabulation of all the comparisons given, however, shows the following results:

Report dated	Actual prices exactly equal to M. P. B. prices	Actual prices over M. P. B. prices	Actual prices under M. P. B. prices
January 13, 1921.....	14	20	5 (1 explained as per note 1).
January 20, 1921.....	31	22	8 (3 explained as per note 2).
January 27, 1921.....	21	11	10 (10 explained as per note 3).
February 3, 1921.....	49	21	11 (5 explained as per note 4).

(1) Quotation lowered to meet competition.

(2) One sale to association member, two sales on quotation made prior to Jan. 6, 1921.

(3) Nine sales to association members, one sale price reduced because of cancellation after car loaded.

(4) Three sales made to association members, two sales made with 50¢ error in freight rate.

A further analysis of the comparisons made by the January, 1921, sales reports between the actual prices and the minimum prices shows that the companies of the witnesses who testified as to their general disregard of the minimum prices in fact almost invariably maintained them during the only period for which an accurate check can be made.

The Holt Hardwood Company, represented by Mr. DeWitt, made three sales at the minimum prices, seven over, and two under—one of these being explained as having been taken January 5, the day before the agreement went into effect. This company apparently did make one unexplained cut of 50 cents. It is also noteworthy that three months after the Department of Justice was assured that the M. P. B. had been abrogated and would not be proceeded with, a table of values dated May 21, 1921, was sent out by the association; that shortly thereafter the Holt Company, in answer to an inquiry, advised the Wood Lumber Company of Worcester, Massachusetts, that it was revising its prices; that it quoted delivered prices at Worcester which were identical with the new delivered values established by the May 21 table, and that notwithstanding a lengthy correspondence, the Holt Company steadfastly refused to deviate from the new prices, and manifested great confidence that prices would be stabilized on the new basis. (Vol. I, pp. 244-247.)

The comparison also shows that during the period of the formal existence and operation of the

M. P. B. in January, 1921, William Horner, represented by Mr. Ralston, *made nineteen sales at the minimum prices, three over, and two under—the latter being explained as due to an error in the freight rate*, and that the Cummer-Diggins Company, represented by Mr. Saunders, *made six sales at the minimum prices—but none either over or under those prices.*

Why the Minimum Price Basis was substituted for the Minimum Price Plan is perfectly apparent. No penalties are necessary when each competitor is required to reveal his violations of an agreement or tacit understanding to the others. This has been repeatedly demonstrated in the operation of these associations. Therefore, the penalties were eliminated, and each member was required to report his individual sales which were repeated by the secretary to the members; and the explanations of nearly all the sales made under the prescribed minimum prices show the moral restraint imposed upon the members.

Mr. Keehn stated with reference to the Minimum Price Basis:

The minimum price basis never provided for any penalty of any kind. A man could do just as he pleased about it. It was without force or effect. It was simply a statement of business policy. (Vol. I, p. 82.)

We did not exact any penalties of any kind under the Minimum Price Plan, but in

the Minimum Price Basis no penalties of any kind were even prescribed. *It is simply a statement of business policy and was for handling the sales of maple, beech, and birch flooring.*

The COURT. Will you permit me a question? If I understand you, with the exception of a declaration that penalties would be imposed or might be imposed, the method of obtaining the cost of production and selling was the same under these two plans, that is, the Minimum Price Plan and the Minimum Price Basis, as you call them, and the information furnished members of the Association was the same information, in substance?

A. In substance the same basis was used in arriving at the average cost of producing and marketing flooring with the exception of the interest rate that I mentioned.

The COURT. Then, the difference would be, the substantial difference would be that in the one case, in form at least, you required it, and in the other you advised it?

A. I wouldn't say that we advised it. We gave it to the members to use in such way as they wished to use it. (Vol. I, p. 102.)

It is quite apparent, however, that whatever may have been the situation with reference to the observance of the minimum prices under the Minimum Price Plan, under the Minimum Price Basis, supported by the information conveyed to every member as to every sale below the minimum, the minimum prices were very scrupulously maintained.

In view of the overwhelming evidence that the

Minimum Price Plan and Minimum Price Basis agreements were in fact observed, Mr. Keehn's effort to make it appear to the contrary should cause his testimony upon other material matters to be received with caution.

IV

Abrogation of Minimum Price Basis, and negotiations leading up to adoption of present articles of association

A resolution adopted at a meeting held February 25, 1921, declared the minimum price basis null and void, and stated that neither the association nor its members would operate under it. This action was taken in accordance with assurances given to the Department of Justice by the president of the Association in a letter dated February 11, 1921, (Vol. IV, p. 803) *prompted by the receipt of a letter from the Assistant to the Attorney General stating that the minimum price basis and rate book transmitted to him indicated a flagrant violation of the penal provisions of the Sherman Act.* (Vol. IV, p. 802.) Apparently, however, at least one of the members of the association still considered that the association prices, or costs, or values, were to be maintained, for in a letter dated March 19, 1921, to Mr. Keehn, the Osgood and Blodgett Mfg. Co. referred to cuts appearing in the sales reports, and then stated:

If there has been a new list established it would seem to us that we all ought to be ad-

vised, as our quotations at the standard price are being turned down daily. (Vol. IV, p. 480.)

In a letter to members dated April 21, 1921, Mr. Keehn advised them of a general meeting to be held on the 27th of that month, and stated that conditions in the flooring industry were in a deplorable state and that it was of the utmost importance that every member of the association be represented; and in a letter to the Holt Hardwood Co., dated April 23, 1921, he said:

We are glad you will be represented at the meeting on the 27th, and note what you say about not furnishing any more reports *until there is something done to make more co-operation*. I hope some new plan can be worked out that will improve conditions. (Vol. IV, p. 563.)

The minutes of the special meeting held April 27, 1921, contain only the following brief reference to the "new plans" under consideration:

The statistical reports for the month of March, 1921, were submitted to the meeting and briefly discussed, and several plans to remedy the present deplorable conditions in the industry were suggested and considered, but no definite conclusions were arrived at.

It was suggested that the plans proposed be given further thought and that the meeting adjourn subject to the call of the President with the understanding that the Presi-

dent would call such meeting to be held at as early a date as possible. (Vol. III, p. 134.)

But in a letter to Mr. Earle, Mr. Thomas, and Mr. Whedon, dated April 30, 1921, Mr. Keehn said:

GENTLEMEN: We have prepared a rough draft of new Articles of Association, effective from May 1, 1921, to July 1, 1922, and are sending each of you a copy for such suggestions in the way of revision as you may wish to make.

Several new features have been incorporated as the result of experience, etc., since the old Articles were formulated. You will note that in Article II, "Objects," we have included some of our creed as it appears in our advertising literature, and that we have inserted a clause regarding actually completed and closed business transactions, which, of course, refers to our Weekly Sales Reports; we have also declared our intention regarding Surveys of Cost and what we consider the fundamental elements to be used in arriving at the basis of ascertaining cost to the manufacturer of producing and placing on the market Maple, Beech, and Birch flooring.

It is my thought, when we prepare an Average Cost Chart, that Frame A will represent the average cost F. O. B. cars at flooring plants and subsequent frames will show the cost of delivering to destination, which would mean Frame A plus average

cost of freight, and this average cost of freight, would be based upon the freight rate from Cadillac, Mich., which we consider represents the average freight rate from all the flooring mills to all the destinations. I thought it unnecessary to mention delivered values in the Articles of Association, *as whatever Average Cost Charts are compiled to show the delivered prices* would be simply mathematical and a supplemental detail, which would not in any way be contrary to the principles outlined in Article XIV.

We are waiting to hear from Mr. Thomas before proceeding further with the other plan discussed at the meeting, and in this connection perhaps it would not be out of place for me to say that, in view of the representations made by Dr. Earle as President of the Association, in his last letter to Mr. Nebeker (a copy of which you have), and also in view of the resolution adopted at the general meeting held on February 25, and approved at the meeting held on April 27, we should carefully consider any new plan the adoption of which might raise a doubt in the mind of Mr. Nebeker as to the sincerity of the representations in Dr. Earle's letter, evidence of which sincerity the Department of Justice may call upon us for at any time, and also as to the sincerity of the resolution adopted February 25, and approved April 27.

By the way, I see by the newspapers this morning that the Federal Trade Commission has again attacked the Pittsburgh base used

by the steel industry and that the Commission is also going into the question of fixing prices by all the steel manufacturers by using the Pittsburgh base. It seems the Commission is divided on the question, three of the members opposing the Pittsburgh base and two of them not opposing it. (Vol. IV, pp. 534-535.)

The record does not contain the minutes of a meeting held May 20, 1921, but in a letter to members dated May 26, 1921, Mr. Keehn stated:

GENTLEMEN: Only three of the members who attended the general meeting on the 20th and who promised then to make the weekly reports of sales did not make their reports for the week ending May 21st. No doubt they are under the impression that the *new Plan under which these reports are to be made by every member of the Association*, would begin with the week ending May 28th, instead of with the week ending May 21st. (Vol. IV, pp. 451-452.)

The record does not definitely establish the nature of the "new plan" referred to, but Exhibit 43 JJ (Vol. III, side pp. 2394-2399) is a report dated October 6, 1921, entitled "Audit Changes, June 2 to July 8, 1921, In Members' Weekly Sales Reports," so it is apparent that the "new plan" required all the members to report all their sales, and provided for an audit to make certain that was done.

In a letter to Mr. Keehn dated *May 26, 1921*, which was circularized to the members under date

of May 28, 1921, the East Jordan Lumber Company said:

We have your favor of the 21st and are exceedingly sorry that the minimum price plan did not go through, as we feel this is the only plan which has ever worked out satisfactorily, and that it would be especially valuable to us at this time. (Vol. III, p. 313.)

Whatever may have been the fate of the Minimum Price Plan at the May 20, 1921, meeting, the record contains a table dated *May 21, 1921, (three months after the date of the resolution nullifying the Minimum Price Basis)* entitled "*Concessions and Additions—Table of Values May 21, 1921, 13/16'' Maple and Birch D. & M. All Grades and Faces, Full List,*" gives the concessions and additions for other faces, grades, and woods, and also states the rules with reference to commissions and terms of sale. (Vol. III, p. 326.) A letter to members dated June 3, 1921, shows that this concession sheet had been sent out the preceding day with *Tables of Values for 13/16'' and 3/4'' flooring as new fillers for the Rate Books, and also that the list of wholesalers and commission men was being revised and reprinted, and that the names of unclassified dealers would be passed upon by the committee the same as theretofore before being listed.* (Vol. III, pp. 313-314.) Apparently the Trade Relations Committee had charge of that matter, as the call for a meeting to be held July

8, 1921, stated that that committee might have a report to make regarding the list of wholesalers and commission men. (Vol. IV, p. 452.)

In a letter to members dated August 11, 1921, calling a meeting to be held August 19th it was said:

Our weekly Sales Reports indicate considerable demoralization in the flooring situation and it seems absolutely necessary that every member should be represented at the meeting *so that greater cooperation can be assured and conditions in the industry, which are now much disturbed, can be stabilized.* (Vol. IV, p. 567.)

And the action taken at the meeting on that subject is stated in the following paragraph in the minutes:

Revise Articles of Association.—After a prolonged discussion of the demoralized conditions in the flooring industry, the Secretary was instructed to prepare a draft revising the Articles of Association *with the view of securing greater cooperation in the industry*, and to have the draft of the revision ready to submit to the next general meeting of the Association. (Vol. III, p. 138.)

A letter to members dated September 16, 1921, transmitted to the members the proposed articles of association dated October 1, 1921, the principal features of which have been explained heretofore on pages 15 and 19, and stated:

GENTLEMEN: In accordance with your instructions at the last general meeting of the

Association, the proposed revision of the Articles of Association has been drafted and in order that you may have an opportunity to study them before the next meeting is held, we are enclosing a copy which, for your greater convenience, is in printed form. The printer is holding the type set up so that further revisions can be made, if desired.

Several changes are suggested in this proposed revision, namely:

Article II, "Objects," have been made more general and include "*the exchange of information concerning the character and nature of actually completed and closed business transactions of its members.*" This refers to the Weekly Sales Reports, etc.

Article XIV, "Determining average cost" is entirely new. (Vol. IV, pp. 568-569.)

* * * * *

It is now expected that a general meeting of the Association will be held on Friday, the 23d, and that a meeting of the Special Committee will be held on Thursday, the 22d, in order to draft some simple memorandum along the lines suggested at the last meeting and submit same to the general meeting on the 23d.

Conditions in the industry as reflected in the Weekly Sales Reports are greatly demoralized, as all of you of course know, and if any progress whatever is to be made in the work of the Association it is absolutely necessary that every member be represented

at the next meeting, with full power to act, so that definite conclusions can be arrived at then and there. (Vol. IV, p. 570.)

The above letter also appears in the record as Exhibit 6 (Vol. III, p. 61), but as cited under the above quotation the letter is a part of Exhibit 77, and was introduced in evidence in connection with three undated "Rough Drafts," each entitled "Declaration of Our Business Policy." The three forms are substantially the same, so only Form 2, which is as follows, need be quoted:

Believing that the sale of any commodity below the cost of production is unfair competition and is certain to be ruinous and destructive to any industry and consequently is detrimental in the long run to public welfare, we hereby voluntarily agree, regardless of what other manufacturers of flooring may do, to pay into the Treasury of the Maple Flooring Manufacturers Association, Ten per cent (10%) on any and all sales we may make of Maple, Beech, and Birch flooring, 13/16" and thicker, of standard grades and lengths at values below the average cost of production, plus the average cost of freight to destination, as ascertained from time to time by the Maple Flooring Manufacturers Association's Survey of Costs and Tables of Values Based Upon Average Cost, after allowing for commissions not exceeding \$2.00 per M feet to Wholesalers and Commission Men and to our own Special Representatives. And the

said Ten per cent (10%) shall be reckoned upon the average cost of said flooring delivered at destination as indicated by the Maple Flooring Manufacturers Association's Rate Book. (Vol. IV, p. 568.)

It is thus seen that ever since the adoption of the first articles introduced in evidence up till at least February, 1921, the organizations of which a large majority—of some nearly all—of defendants were members had been engaging in practices palpably unlawful. In February, 1921, they were driven to a declaration of abandonment of these practices by fear of criminal prosecution. As the court judicially knows, at that time, and for some time thereafter, business generally throughout the country was greatly demoralized; and the industry in which defendants were engaged was not excepted from the general conditions. The organization under the articles of association which when adopted were to continue until July 1, 1922, was still functioning; but after the Minimum Price Basis scheme was abrogated the organization was not accomplishing the results desired. As appears from such meager correspondence and other documents as the Government was able to obtain, there was manifestly much consultation among the members, and every ingenuity, by both the members and especially by the secretary, was being exercised to perfect a plan which would accomplish results the same as, or more satisfactory than, those accomplished by the Minimum Price Plan and the Mini-

num Price Basis scheme. As stated in the correspondence, there was no such *cooperation* among the members as was desired. And the purpose was to devise a plan by which the necessary *cooperation* could be brought about. They were so anxious that this new scheme be adopted and put in operation that they would not wait till July 1, 1922, for the old articles to expire, but adopted the new articles in March, 1922, and dated them back to January 1, 1922. (Keehn, Vol. I, pp. 78-79.)

With this background in mind let careful examination be made of the articles and organization in existence when the bill in this case was filed, and which are still observed except as to one or two trifling modifications made some months after this action was begun.

V

Plan under which the association was operating when bill was filed

These articles of association purport to run from January 1, 1922, to January 1, 1925, and are filed as Government Exhibit 8. (Vol. III, pp. 64-74.) The parts of this plan which are especially material are as follows:

It is declared, among other things, that its object is "to exchange information concerning the character and nature of actually completed and closed business transactions of its members; to collect and disseminate statistics concerning the flooring industry"; but it is declared that the association shall

not, either directly or indirectly, fix, regulate, or control the price, output, purchase, or sale of flooring, or attempt to do so. (Vol. III, p. 64.) The officers are a president, a vice-president, a treasurer, a secretary, and a board of trustees, which board consists of the president, vice-president, and treasurer, and four members elected by the association. (Vol. III, p. 65.) The board of trustees is vested with practically all of the governing powers (p. 66). It is provided that an annual meeting for the election of officers shall be held on the third Wednesday in January of each year, and that regular meetings shall be held on the third Wednesday of April, July, and October, and that special meetings may be called by the president or by a majority of the board of trustees, and that a meeting of the board of trustees may be held at any time called by the president or by a majority of the board (p. 67).

Article XIV, which relates to cost of production, reads as follows:

SECTION 1. The sound business principle advocated by the Federal Trade Commission that manufacturers should carefully consider the question of cost in manufacturing and selling their product is recognized by the Association as the only scientific method of conducting the business of manufacturing and marketing Maple, Beech, and Birch flooring.

SECTION 2. For the purpose of furnishing to its members information regarding *the average cost* of manufacturing and market-

ing Maple, Beech, and Birch flooring, Surveys of Costs to *ascertain such average cost* shall be made from time to time by the Association, and such Surveys of Costs shall be filed with the Federal Trade Commission at Washington, D. C.

SECTION 3. In the judgment of the Association the following fundamental elements enter into and determine *the average cost* of Maple, Beech, and Birch flooring to the manufacturers when manufactured, sold and delivered F. O. B. cars at the flooring plant:

(a) The actual market value of the raw material, as established from time to time by current sales of rough flooring lumber on the open market;

(b) *The average cost and expense* of manufacturing, selling, and delivering flooring F. O. B. cars at the flooring plant;

(c) Interest on the capital actually invested in the flooring business at the rate of six per cent per annum;

(d) Annual depreciation of plant as is usually allowed by the United States Government;

(e) The usual overhead charges in carrying on the flooring business; and

(f) A reasonable allowance to provide for contingencies and unforeseen hazards incident to manufacturing operations. This allowance is estimated at five per cent of *the average total cost* of Maple, Beech, and Birch flooring when delivered F. O. B. cars at the flooring plant. (Vol. III, p. 69.)

With reference to statistical reports, it is provided in Article XV as follows:

SECTION 1. In order that the relations of supply and demand and the statistical conditions existing from time to time in the Maple flooring industry may be known, the following statistical monthly reports shall be made to the Secretary by each member of the Association on or before the 5th day of each month:

(a) Report of Stocks on Hand of Maple, Beech, and Birch Flooring at the end of the previous month.

(b) Report of Unfilled Orders on Hand for Maple, Beech, and Birch Flooring at the end of the previous month.

(c) Report of the amount in feet of Shipments made during the previous month of all kinds of Maple, Beech, and Birch flooring for use within the United States, except Maple, Beech, and Birch flooring purchased from other members of this Association.

(d) Report of Production of Maple, Beech, and Birch Flooring during the previous month.

(e) Report of New Orders Booked for Maple, Beech, and Birch Flooring during the previous month.

(f) Report of Average Prices Realized F. O. B. flooring plant after deducting freight, for 1½" x 2¼" face Clear, No. 1 and Factory Maple Flooring, standard grades and lengths, sold during the previous month.

SECTION 2. *In addition to the foregoing monthly reports, each member of the Association shall send to the Secretary promptly at the end of each week a report of all sales made during that week of Maple, Beech, and Birch Flooring. These weekly sales reports shall state the quantity, kind and grade of flooring sold, the delivered price sold at, the average freight rate to destination of shipment, and the commissions paid, if any.*

SECTION 3. All the foregoing statistical reports shall be made upon blank forms furnished by the Association and shall relate wholly and entirely to past and completed transactions. Said reports shall be mailed by the members to the Secretary, *who shall report the same to the members.* (Vol. III, p. 70.)

The Association adopted a trade-mark for the use of its members, and the articles set forth a trade-mark agreement whereby the member is permitted to use the trade-mark as long as he retains his membership, but such right shall cease immediately upon his ceasing to be a member. Every member is given a number which appears on the trade-mark for identification. Each member agrees that he will maintain the standard grades which the association may from time to time establish, and that an inspector shall have the right to visit the plant to see that the grades are properly maintained and to protect the association against damage should the member fail to maintain the standard fixed; and a license fee of fifty dollars is paid for the use of the

right to use the trade-mark. (Vol. III, pp. 72-73.) The members are required to pay to the association the following amounts:

1. All new members admitted after May 1, 1922, are required to pay for the benefits which "they will enjoy from the Association trade-mark" the additional sum of \$100 for each matcher installed for the manufacturing of flooring, which is a part of the Advertising Fund. (Vol. III, p. 65.)

2. Each member pays a fee of \$200 for each matcher, which constitutes a fund called "The Membership Fee Fund." (Vol. III, p. 68.)

3. Each member pays 25c per M feet on all flooring shipped, except flooring purchased from other members, which goes into the "Expense Fund" to provide for the current running expenses of the association. (Vol. III, p. 71.)

4. Each member pays 10c per M feet on all flooring shipped, except flooring purchased from other members, which goes into the "Advertising Fund" (p. 71).

5. An annual fee is paid by each member of \$50 as a license for use of trade-mark which also becomes a part of the "Advertising Fund" (p. 73).

The Government insists that the plan thus promulgated was designed to, and in fact does, accomplish more effectually the objects which were accomplished by defendants and their associates under the Minimum Price Plan and Minimum

Price Basis scheme. *In fact, as operated defendants are carrying on nothing less than a Minimum Price Plan effectually enforced by the continual exchange and distribution of information among the members of the association, and by open meetings and private conferences among members in which every phase of the industry is discussed.*

The principal agencies through which the desired results are accomplished are:

(1) The computation and distribution among the members of a so-called average cost of all dimensions and grades of flooring;

(2) Computing and distributing among the members a booklet showing freight rates on flooring from Cadillac, Michigan, which by agreement is made a basing point for the computation of freight rates, to thousands of points in the United States, and also showing the pretended average cost prices of flooring delivered at such points and advising how such prices may be computed for other points;

(3) Exchanging statistics by which every member reveals to every other member what he is doing, the prices he is receiving for flooring, and the exact condition of his business; and

(4) Meetings where the members congregate and both openly in a body and individually among themselves discuss every phase of the industry, and exchange views as to future policies and prices.

These agencies will be considered in the order mentioned.

VI

Construction and circulation of list or base prices

The excuse for computing and distributing among the members lists showing alleged "cost prices" is that it is of great value to the manufacturer that he be informed as to the cost of production and distribution of the article manufactured. The importance to the manufacturer of knowing *his* cost of production and distribution is fully recognized. How far competitors may cooperate in determining a *method* of cost accounting need not here be discussed, as defendants went far beyond a mere method of accounting. But it may be observed that when competing manufacturers interest themselves in the affairs of each other the natural and legitimate inference is that it is done to reduce the pressure of competition.

If it were conceded that competitors may agree upon a uniform *method* of cost accounting, yet there is a very wide and vital distinction between using a uniform *method or system* of cost accounting and *adopting either formally or tacitly uniform costs*. It is obvious that there must be a wide difference in the actual cost of production and marketing among the members of the association. Singularly enough counsel for appellants in their brief have strongly emphasized these differences. On page 66 of their brief appears the heading "Divers facts which are insuperable barriers to concert of action by defendants with respect to

production, prices, commissions, or terms of sale." And thereunder it is pointed out that there are great differences among the members in the following respects:

- (1) The amount of maple, beech, and birch timber owned by them;
- (2) The quantity of flooring produced;
- (3) Location of plants;
- (4) The value and quality of the timber owned or the rough lumber available to the different members;
- (5) Some members produce only flooring, while others are engaged in various branches of the lumber business, as well as in other lines of industry;
- (6) All the members manufacture maple flooring, twelve manufacture beech flooring, and fifteen birch flooring;
- (7) Different matchers, or flooring machines, are used, which vary in capacity;
- (8) All members are not engaged in producing the same thicknesses and widths of flooring;
- (9) The trade of some is local, while others sell throughout the United States and for exportation; and
- (10) Different sales methods are used.

And on page 244 of Appellant's brief it is said:

"The defendant association has more than 20 members, *among whom exist great differences*. Manifestly, the *association* (Italics theirs) could not undertake to furnish its *members* (Italics theirs) with the

cost (Italics theirs) of producing and distributing maple, beech, and birch flooring ”;

And on page 245 the brief continues:

“All the association could do was to undertake to furnish its members with the *average* (Italics theirs) cost of production and distribution of maple, beech, and birch flooring. Of course, this means the average cost of members of the defendant association.”

Now it is not only admitted, but the fact is emphasized, that there are great differences in the conditions under which the several defendants are operating; and that *necessarily* there are *wide* divergences in the costs to the members of production and distribution of flooring. While it is not admitted that the association *could* not undertake to furnish each member with the cost of its production and distribution of flooring, yet it is admitted that the association *ought not to do so*. *Each member should make its own estimate based upon its own peculiar conditions and items of cost*. It is not true either that “All the association could do was to undertake to furnish its members with the average cost of production and distribution of * * * flooring.” The association could have given some suggestions to each member as to *how it could properly make its own estimate*. And it was altogether improper and illegal to furnish the members with the *average* cost of production and distribution. *The very foundation of competition is the dif-*

ferences to competitors in the cost and distribution of the article manufactured by them. It is that which enables one competitor to undersell another. When that is eliminated competition practically disappears. Is there any one who will contend that if these defendants had positively agreed to adopt these estimates of *average cost* of production and distribution as their *actual costs*, and to figure prices upon that basis, such an agreement would not violate the Antitrust Act? The only element left for competition would be the amount of profit each would be content to make. If such actual and open agreement would be unlawful, an implied agreement or the accomplishment of the same purpose through an association, is also unlawful.

Since the *average cost* was not the *actual cost* of any member why furnish any of them with the average cost? How could it be of use to any member in computing *its costs*? The Government insists that the evidence establishes beyond possible controversy that this plan and practice of computing and distributing *average costs* of production and distribution *was adopted and has been continually used, and is still used, as a method of determining the minimum price at which flooring has been and is to be sold; and that the claim that it is done as an aid to the members in estimating their own costs is a mere pretense and sham.* The following is a short history and analysis of this feature of the association's activities.

The members of the Association during the entire time since 1913 have distributed among themselves through the secretary lists designating what are now called "average costs" of the various grades and dimensions of flooring. Mr. Keehn testifies:

Q. That method has been used for how many years?

A. I think we commenced, originally, in 1913 under what we termed "scientific list." That was based on the old work of the Market Conditions Committee.

Q. You have been using that same method since—the same general principles—and are using them to-day?

A. We are using it to-day. (Vol. I, p. 110.)

And with reference to the computation of costs, he says:

This same method has been pursued at different times, and we have a number of those calculations going way back to 1913. (Vol. I, p. 109.)

The preparation and distribution of the first so-called "cost list" which is variously referred to in many of the circulars, reports, and minutes in the record as the "Scientific List" or "Scientific Price List" (Vol. III, p. 114, p. 207, p. 228, p. 230), the "Recommended List" (Vol. III, p. 205), the "Logical Basis of Values Table" (Vol. III, p. 211), and the "Delivered Table of Values" or "Table of Values" (Vol. III, p. 213, p. 215, p.

222, p. 238) was authorized at the annual meeting of the association held January 22, 1913 (Vol. III, p. 106 and p. 108). The portion of the memorandum of the meeting covering this matter reads as follows:

It was the opinion of the members present that considering the present market values of rough lumber and the actual costs of manufacturing and selling flooring, the present values of flooring are entirely too low, and it was suggested that at the next meeting of the Market Conditions Committee, the Committee figure out what the selling values of flooring would be if a logical and scientific method of determining values of flooring were used, that is, if the selling values of flooring were based upon the cost of raw material plus manufacturing and selling costs and plus a reasonable profit. (Vol. III, p. 106.)

The references heretofore given to the first "Scientific List" or "Table of Values" establish that it was printed under date of May 21, 1913. No other such list or table was prepared and distributed to the members until the Minimum Price Plan was adopted in 1916, when a new rate book containing the Index of Towns and Table of Values of May 15, 1916, referred to in the Plan (Vol. III, p. 79) was printed (Vol. III, p. 242). The memoranda of Association meetings and the Reports of the Market Conditions Committee contained in the record for the period from 1913 to May, 1916, are not complete,

but they disclose only *one* instance during that period, in January, 1915, when a change in the delivered values was recommended *on the basis of new data covering manufacturing and selling costs and the current value of the raw material* (Vol. III, pp. 230-231) ; whereas they disclose *ten* instances where recommendations as to the current price obtainable (in terms of additions to or concessions from the list of May 21, 1913) were made by the Market Conditions Committee solely *on the basis of analyses of the association statistics as to stocks, shipments, and production, new business booked, and current net values*. These instances are shown by the Reports of the Market Conditions Committee dated respectively March 25, 1914 (Vol. III, pp. 204-205), June 25, 1914 (Vol. III, pp. 210-211), August 22, 1914 (Vol. III, pp. 214-215), September 24, 1914 (Vol. III, pp. 216-220 at 219), October 30, 1914 (Vol. III, pp. 220-222), November 20, 1914 (Vol. III, pp. 222-224), December 18, 1914 (Vol. III, pp. 225-226), February 25, 1915 (Vol. III, pp. 231-233), April 15, 1915 (Vol. III, pp. 237-239), and May 26, 1916 (Vol. III, pp. 240-242).

That general market conditions had a more controlling effect than actual costs in determining minimum prices even during the time when the Minimum Price Plan was in effect, is shown by the recommendation of the Market Conditions Committee under date of August 21, 1919, for an advance in the minimum price in accordance with the procedure established by Article IV of the plan. This recommendation reads as follows:

Raw Material Higher.—Since the last meeting of the Committee there has been an advance in the market value of rough flooring lumber, according to reliable information given to the Committee in regard to several recent sales on the open market. *If the advance in the rough lumber and the steady increases in Manufacturing and Marketing costs were fully met, an advance of \$10.50 in the M. P. P. Basis would be required, but in view of all conditions, the Committee recommends horizontal advances of \$6.00 on Clear, \$6.00 on No. 1, and \$5.00 on Factory $\frac{13}{16}$ " and thicker Maple, Beech, and Birch flooring, effective immediately with the understanding that old quotations now outstanding may be protected, if desired, up to August 30th, inclusive.*

* * * * *

Please advise the Secretary immediately upon receipt of this report whether or not you concur in the recommendation of the Committee, and if the recommendations are adopted, new Concession sheets will be printed and mailed you at once. (Vol. III, pp. 250-251.)

Analysis of elements and computation of so-called cost prices

There are three general elements that enter into the computation of these so-called cost prices:

1. Manufacturing costs;
2. The cost price per thousand feet of rough lumber out of which the flooring is made; and

3. The percentage of waste in converting the rough lumber into flooring.

As to how manufacturing costs are estimated, the secretary, Keehn, says:

The information from which we figured out the cost of production came from the members of the association. We had no information from nonmembers regarding their cost of production. Referring to Gov. Ex. 23 (a sheet entitled "Survey of Costs, 3rd Quarter, 1922") we use the same form but employ different calculations. We are still sending out the questionnaire above referred to and by means of them ascertain the average of actual costs. (Vol. I, pp. 104-105.)

The questionnaire now sent out was read into the record by this witness and appears on page 108, Vol. I. The secretary takes the replies from the several members and makes an average of them all. A questionnaire relating to production and marketing costs of the flooring produced during January, February, and March, 1922, with *an average* of the figures given in the answers as to each item, is filed as Gov. Ex. 25 (Vol. III, p. 279), which is as follows:

	Per 1 M Ft. of Flooring Produced
1. Labor taking lumber off of dock, car, pile, or wagon and placing in dry kiln, including expenses of night fireman...	\$1. 16
2. Cost of manufacturing into flooring and putting flooring in warehouse, including twine, oil, belting, and other factory supplies, and factory repairs and including manufacturing administrative expenses.....	8. 34
3. Warehouse expense and loading into cars or on wagons.....	. 90
4. Insurance and taxes. (Divide $\frac{1}{4}$ of annual amount by quantity of flooring produced during January, February, and March)	1. 07

Per 1 M Ft.
of Flooring
Produced

5. Interest of 6% on value of plant and on value of average stock carried of rough flooring lumber and of finished flooring. (Divide $\frac{1}{4}$ of annual amount by quantity of flooring produced during January, February, and March)	\$1.92
6. Selling expenses, including commissions and advertising, and office expenses including selling administrative expenses	3.75
7. Cash discount	.80
8. Annual depreciation on flooring plant as is usually allowed by the United States Government. (Divide $\frac{1}{4}$ of annual amount by quantity of flooring produced during January, February, and March)	1.37
9. Total per M feet	19.31
10. Less net profit from wood and other by-products of flooring lumber, per 1 M feet of flooring produced during January, February, and March	1.32
11. Actual Manufacturing and Marketing Costs per 1 M feet of flooring produced during January, February, and March	17.99
MAY 31, 1922.	

The questionnaire read into the record (Vol. I, p. 108), which appears to have been in use in 1923 some time after this action was begun, contains two queries not included in this one, to wit, "Quantity of flooring produced by us during July, August, and September" and "Our percentage of waste in manufacturing flooring during July, August, and September," but the information thus asked for was obtained in other ways.

With reference to the second element, cost of rough lumber, Mr. Keehn says:

When an estimate of cost was made we also had the market value of the rough lumber as established by sales in the open market. We might have such information from the lumber trade papers or from sales made by sawmill operators of flooring lumber on

the market or from members of the Association who had purchased the rough lumber on the open market. We used all sources of information. This information was sent in by members of the Association, sometimes to me, sometimes to the Market Conditions Committee, all for the use of the Market Conditions Committee. Sometimes during the past year we would get this information at meetings of the Association by asking each one what he was paying for rough maple lumber on the open market, actual sales. The Committee on Cost Surveys ordinarily came to the conclusion as to what information was to go out in my reports to the members. The cost of rough maple lumber was taken by using several purchases—five, six, eight, or ten—and we might take the average the same as the Government does in compiling its data regarding the value of rough maple lumber on the open market. (Vol. I, p. 104.)

From the beginning there has been a Committee which had special duties to perform in regard to constructing these price lists of flooring. Formerly it was called the "Market Conditions Committee," but now is known as the "Cost Surveys Committee." With reference to the functions of this Committee, Mr. Keehn says:

The Cost Surveys Committee does not perform exactly the same function as the Market Conditions Committee did. The Committee on Cost Surveys simply goes into the

cost of the raw material, the cost of marketing and manufacturing, and takes no notice of any kind of the selling price of flooring. (Vol. I, p. 105.)

However, it is apparent from Mr. Keehn's testimony (Vol I, pp. 104-110) that the information was all gathered and the computations made by himself, and that but little work was actually done by the Committee. In fact, Mr. Dewey, Chairman of the Cost Surveys Committee, testifies to that effect. (Vol. I, pp. 396-399.)

The information as to the third element, the amount of waste resulting from converting rough lumber into flooring, is obtained by one or more members making what is known as "Test Runs." Sometimes the same member makes several runs; and at other times the runs are made by different members; and the estimates are based upon the average waste resulting from the several runs. The manufacturer making the run keeps a record of the quantity of each grade of rough lumber used and also of the quantity of each grade and dimension of flooring produced, and, of course, the difference is the amount of waste.

The final result is obtained by putting together the three elements mentioned, and determining therefrom the alleged cost price of each grade and dimension. A careful study of the tables will show that this work, *especially that of distributing the cost price between the various dimensions*, is done

by a genius. With reference to how often the estimates are made, Mr. Keehn says:

We make those estimates from time to time according to when the market changes on rough lumber or according to when the manufacturing and marketing costs are changed. There is no definite period. We make them at very irregular intervals. I would say without looking it up we made perhaps three or four during 1922. (Vol. I, p. 110.)

This witness undertook to explain how the estimates are made (Vol. I, pp. 105-106), but, presumably through error of the stenographer in taking the figures, but few of the results stated can be obtained from the quantities given, and the estimates can be more readily understood from a study of the tables themselves. Exhibits 25-A, 26, 27, and 28-N (Vol. III, pp. 280, 284, 287, and 315) are four estimates, all based on "the three test runs of 1921, made by North Branch Flooring Company, Chicago, in January, 1921, and between May 1 and September 10, 1921." For the element of manufacturing and marketing costs the first of these estimates (Exhibit 28-N, p. 315) was based on an estimate of average of such costs for the first half 1921; the second estimate (Exhibit 25-A, p. 280) was based on such costs for the first quarter 1922; the third estimate (Exhibit 26, p. 284) was based on such costs for the third quarter 1922; and the fourth estimate (Exhibit 27, p. 288) was based on such costs for the last quarter 1922.

Government's Exhibit No. 28-N
Three Test Runs of 1921

Made by North Branch Flooring Company, Chicago, in January, 1921, and Between May 1 and September 10, 1921.

Rough Lumber Used

792 M ft. No. 1 Common-----	51.5%
562 " " No. 2 Common-----	36.5 "
185 " " No. 3 Common A-----	12.0 "
1,539 M ft-----	100. %
51.5% No. 1 Common @ \$39.50-----	20.34
36.5 " No. 2 Common " 24.50-----	8.94
12.0 " No. 3 Com. A " 11.50-----	1.38

100. %

1000 Ft. Lumber Cost-----	30.66
800 Ft. Flooring Costs-----	30.66
1000 Ft. Flooring Costs-----	37.95

Manufacturing and Marketing Costs Average

First half 1921:

Avg. of 8 Reports
Less Value of Wood
Average

\$22.28
1.24
21.04
58.99

Add 5% for contingencies----- 2.95

Average Cost F. O. B. Flooring Plant of 1,000
Ft. of Flooring Sold----- 61.94

Clear:

13/16 x 1 1/2"-----	2.5%	\$85.	\$2.13
2"-----	3.3 "	83.	2.74
2 1/4"-----	41.7 "	90.	37.53
3 1/4"-----	2.1 "	80.	1.68
3/8" All Faces-----	2.4 "	60.	1.44
	52. %		\$45.52

No. 1:

13/16 x 1 1/2"-----	1.3%	\$53.	.69
2"-----	2.5 "	53.	1.33
2 1/4"-----	24.9 "	60.	14.94
3 1/4"-----	.7 "	45.	.42
3/8" All Faces-----	1.3 "	60.	.59
	30.7%		\$17.97

Factory:

13/16 x 1 1/2"-----	.7%	\$15.	\$.11
2"-----	.9 "	23.	.21
2 1/4"-----	14.7 "	25.	3.68
3 1/4"-----	.8 "	27.	.22
3/8" All Faces-----	.2 "	10.	.02
	17.3 "		4.24
	100. %		\$67.73

Totals----- 100. %

Flooring Product, Grades and Faces

Grades	13/16 x 1 1/2"	2"	2 1/4"	3 1/4"	3/8", all faces	Totals
Clear-----	2.5%	3.3%	41.7%	2.1%	2.4%	52. %
No. 1-----	1.3 "	2.5 "	24.9 "	.7 "	1.3 "	30.7 "
Factory-----	.7 "	.9 "	14.7 "	.8 "	.2 "	17.3 "
	4.5%	6.7%	81.3%	3.6%	3.9%	100. %

Rough Lumber Used

No. 1 common	No. 2 common	No. 3 common A	Totals
624 M 40.6%	394 M 25.6%	163 M 10.6%	1182 M 76.8%
168 " 10.9 "	167 " 10.9 "	22 " 1.4 "	357 " 23.2 "
792 M 51.5%	561 M 36.5%	185 M 12. %	1539 M 100 %

Stock

Wisconsin & Upper Mich-----

Lower Mich-----

Government's Exhibit No. 28-N
Three Test Runs of 1921

Made by North Branch Flooring Company, Chicago, in January, 1921, and Between May 1 and September 10, 1921

Rough Lumber Used			Flooring Product		
792 M ft.	No. 1 Common	51.5%	Clear	646 M Ft.	52.7%
562 "	No. 2 Common	36.5 "	No. 1	383 "	30.7 "
185 "	No. 3 Common A	12.0 "	Factory	215 "	17.3 "
1,539 M ft.		100. %		1,243 M Ft.	100. %
51.5% No. 1 Common @ \$39.50		20.34	Waste	296 "	19.2 "
36.5 " No. 2 Common "		8.94			
12.0 " No. 3 Com. A "		1.38	Lumber Used	1,539 M Ft.	100. %
		100. %			

Rough Lumber Used			Totals		
Stock	No. 1 common	No. 2 common	No. 3 common A	1182 M	76.8%
Wisconsin & Upper Mich	624 M 40.6%	394 M 25.6%	163 M 10.6%	357 "	23.2%
Lower Mich	168 " 10.9 "	167 " 10.9 "	22 " 1.4 "		
	792 M 51.5%	561 M 36.5%	185 M 12. %	1539 M	100 %

For illustration Government's Exhibit 28-N (Vol. III, p. 315) is set forth on the sheet inserted opposite. The first part of the table, which shows the quantity and grades of the rough lumber used, is, of course, the same in all of the four estimates based on these same test runs.

Mr. Keehn claims that by resolution of July 19, 1923, *four and half months after this action was begun*, it was directed that the element of 5% for contingencies which appears in the second part of the table, be eliminated from the calculations. (Vol. I, p. 152.)

The first division of this table is easily understood, as is also the second, assuming that the cost prices of rough lumber and cost of manufacturing are correct. *But on what principle were the prices divided between the different grades and dimensions of flooring, so as to make up approximately the average cost shown by the second part of the table?* There is nothing to show that the waste of manufacture of one grade of rough lumber is greater than that of another, and the cost of manufacturing the different grades of flooring was the same, or practically so. Therefore the only element upon which to base a difference in the *cost* prices of different grades and dimensions of flooring was the difference in the prices of the grades of rough lumber; and it does appear that the *average* of the grades of the finished product in the foregoing estimate were in the neighborhood of the

same proportion to the prices of the grades of rough lumber; that is, the average price of the different dimensions of "clear" flooring was a little more than twice as much as the price of "No. 1 Common" rough lumber, and the same was true, but with a greater difference, as to No. 1 grade of flooring and No. 2 Common lumber, while the average price of factory was somewhat less than twice the price of No. 3 Common A rough lumber. However, since attention is called to this matter in appellants' reply brief (pp. 32 and 33) it is observed that in the later estimates even that general relationship greatly varied. But in estimating *costs* why should $1\frac{1}{8}" \times 1\frac{1}{2}"$ Clear be fixed at \$85 while the same thickness, face 2" was fixed at \$83, that facing $2\frac{1}{4}"$ at \$90, that facing $3\frac{1}{4}"$ at \$80, and all faces of $\frac{3}{8}"$ Clear at only \$60? Here was a spread of \$25 between the several dimensions of *the same grade*. In "costs" of dimensions of No. 1 there was a spread of \$15, all faces of $\frac{3}{8}"$ being estimated at \$45, while $2\frac{1}{4}"$ and $3\frac{1}{4}"$ faces of $1\frac{1}{8}"$ flooring was estimated at \$60. And why should $1\frac{1}{8}" \times 3\frac{1}{4}"$ Factory be estimated to cost \$27 while $\frac{3}{8}"$ all faces is computed at \$10? *Necessarily these were not COST figures at all, but were the prices fixed by the Committee or Secretary Keehn, which the members were advised they should charge for different grades and dimensions of lumber.*

This is further manifested from a comparison of the advances made in the prices of the several grades and dimensions in the four estimates above

mentioned. The other three estimates appear in Vol. III, pp. 280-289. For convenience of comparison a table showing such advances, and also the prices of rough lumber upon which the several estimates were based, and the average prices of manufacture, is here given.

First part

[Showing prices of different grades and dimensions of flooring in the four estimates based upon the three runs made by North Branch Flooring Company in 1921]

	First Est.	Second Est.	Increase	Third Est.	Increase	Fourth Est.	Increase
Clear:							
11 x 1 1/2".....	\$85	\$85	\$0	\$90	\$5	\$90	\$0
x 2".....	83	87	4	90	3	95	5
x 2 1/4".....	90	90	0	95	5	100	5
x 3 1/4".....	80	85	5	80	-5	85	5
3/4 All Faces.....	60	60	0	65	5	65	0
No. 1:							
11 x 1 1/2".....	53	68	15	78	10	78	0
x 2".....	53	72	19	80	8	85	5
x 2 1/4".....	60	75	15	85	10	90	5
x 3 1/4".....	60	75	15	75	0	80	5
3/4 All Faces.....	45	45	0	45	0	45	0
Factory:							
11 x 1 1/2".....	15	20	5	25	5	30	5
x 2".....	23	28	5	35	7	40	5
x 2 1/4".....	25	30	5	40	10	45	5
x 3 1/4".....	27	35	8	45	10	50	5
3/4 All Faces.....	10	10	0	15	5	20	5

(NOTE.—Between the dates of the first and second estimates, a table of values dated November 17, 1921, was distributed. This increased the prices on 2" face Clear, No. 1 all faces, and 3 1/4" face Factory, on the basis of a discussion of trade conditions and costs at an association meeting. [Vol. IV, pp. 142-143.] These increases were not based on a survey of costs and are therefore not considered in the above comparison.)

Second part

[Showing estimated average manufacturing and selling cost of flooring and the prices of the three grades of rough lumber entering into said estimates]

	First Est.	Second Est.	Increase	Third Est.	Increase	Fourth Est.	Increase
Average manufacturing and selling cost of flooring per M.....	\$61.94	\$73.53	\$11.59	\$80.33	\$6.80	\$84.00	\$3.67
Price No. 1 Com.....	39.50	51.00	11.50	56.00	5.00	61.00	5.00
Price No. 2 Com.....	24.50	36.00	11.50	41.00	5.00	41.00	0.00
Price No. 3 Com. A.....	11.50	22.00	10.50	26.00	4.00	30.00	4.00

It might be claimed that the prices of the several grades of flooring should be increased or diminished according to the advance or fall of the prices of the corresponding grades of rough lumber. In other words, there are three grades of rough lumber used in the manufacture of the three grades of flooring, to wit, No. 1 Common, No. 2 Common, and No. 3 Common A, and no doubt No. 1 Common will produce a greater per cent of clear flooring than either of the other two grades, and No. 2 Common will produce a larger per cent of the higher grades than No. 3 Common A.

The witness Greene testifies in effect that such is the fact. (Vol. I, p. 386.) Therefore there may be reason in increasing or diminishing the prices of clear flooring in proportion to the advance or fall of the price of No. 1 lumber, and the same is true as to No. 1 flooring and No. 2 Common lumber, and factory flooring and No. 3 Common A lumber. But in estimating costs, what justification is there for making *a difference in the advance of the different dimensions of the same grade? A study of the foregoing table will show that the increase of prices on lumber has no relationship whatever to the advance of the prices of the grades of flooring.* In the second estimate there was an average increase of \$11.59 in the cost of flooring over the first estimate, and the increase in the average prices of the *grades* of rough lumber were:

No. 1 Common.....	\$11.50
No. 2 Common.....	11.50
No. 3 Common A.....	10.50

But prices of three dimensions of clear flooring were not increased at all, while $1\frac{1}{8}$ " x 2" was increased \$4, and $1\frac{1}{8}$ " x $3\frac{1}{4}$ " was increased \$5. Moreover, there was no increase in No. 1, $\frac{3}{8}$ " All Faces, but the prices of the several faces of $1\frac{1}{8}$ " were increased: $1\frac{1}{2}$ ", \$15; 2", \$19; $2\frac{1}{4}$ ", \$15; and $3\frac{1}{4}$ ", \$15; and the prices of factory were increased 3 faces of $1\frac{1}{8}$ ", \$5; and $3\frac{1}{4}$ ", \$8; and there was no increase in $\frac{3}{8}$ " All Faces.

The increase in the third over the second estimate of the average cost of flooring was \$6.80, the prices of rough lumber having increased \$5 each for No. 1 and No. 2 Common, and \$4 for No. 3 Common A. In distributing this increase among the grades and dimensions, *three of the dimensions of the Clear grade, including $\frac{3}{8}$ all faces, were advanced \$5 each, one, 2" face, was advanced \$3, and one, $3\frac{1}{4}$ ", was reduced \$5.* And in No. 1 Flooring, two dimensions were advanced \$10 each, one dimension \$8, and the other two remained the same. And the prices of two dimensions of factory were advanced \$10 each, two \$5 each, and the other dimension \$7.

The estimated average increase of cost of flooring in the fourth estimate was \$3.67, there having been an increase of \$5 for No. 1 Common rough lumber, no increase for No. 2 Common, and \$4 for No. 3 Common A. But in distributing this among the several dimensions of *flooring*, three dimensions of Clear were advanced \$5 each, and two remained

the same, three dimensions of No. 1 were advanced \$5, and two remained the same, while all dimensions of factory were advanced \$5.

It is perfectly apparent, therefore, that the distribution of the increase or decrease of the so-called cost of production between the different grades and dimensions has no relationship whatever to the advance or decrease in cost; but is based entirely upon other influences, which unquestionably are the prevailing and prospective conditions of the market. In other words, the secretary of the association, aided to some extent by the Committee, surveys the entire situation and makes up a price list which, so far as the relative price of grades and dimensions is concerned, is wholly arbitrary and not controlled in the least by any of the elements that appear in the cost of production.

In fact Keehn incidentally admits as much. The court pointed out a differential of \$10 between "beech, 13/16th dressed" and "matched, all faces" and asked if that was substantially a continuing differential, and Keehn replied:

Not at all times. *It depends upon the supply and demand of these different floorings, to what a man's stock conditions are, and the cost of it, too.* (Vol. I, pp. 153-154.)

These pretended "cost-price" lists that are now distributed among the members are computed in the same way and are the same lists that were, while

the Minimum Price Plan and the Minimum Price Basis scheme were in open operation, distributed as "tables of values" with the written stipulation that they would be observed as the minimum prices at which the flooring was to be sold.

That the manipulation of the spreads between the different sizes and grades of flooring and between the different woods is not based on actual cost, but is purely arbitrary and designed to reflect current market conditions, is clearly established by the following quotations from letters sent out to the members by the Secretary, from Reports of the Market Conditions Committee, and from minutes of meetings during the period from 1913 to 1922.

M. C. C. Report, March 25, 1914

The better movement in Factory should be noted because it indicates that better prices should now be obtainable for this grade, especially in view of the fact that 70% of the 2¼" Factory was sold on March 1st as against only 39% on January 1st. (Vol. III, p. 204.)

**Letter, Keehn to John Schroeder Lumber Co.,
Jan. 30, 1915**

I would like to urge upon you to carefully read and study the annual reports reviewing the work of the Association during the year, and especially the report of the Market Conditions Committee for December, which covers the data collected regarding manufacturing and selling costs, and to which is

attached a table illustrating our so-called Scientific List brought up to date. This table is figured on the basis of the present market value of the raw material, manufacturing and selling costs, *and present selling values for flooring* as applied to the six test runs which were used in the construction of the original Scientific List in 1913. (Vol. III, p. 234.)

M. C. C. Report, May 18, 1917

In exchanging trade experiences, members of the Committee report the demand strong for Factory and No. 1, particularly for Factory, and it is their opinion that this demand will continue strong and grow stronger on account of the class of buildings now in course of construction and which are likely to be built during the summer and fall. *It is the view of the Committee that on account of the oversold condition of Factory and the heavy prospective demand for it that much higher prices than present values can be readily obtained. As the No. 1 grade moved up 62 points during April and as the demand for it seems likely to increase, it should also command higher levels of value.*

* * * * *

The opinion was expressed that the present Spreads between Clear and No. 1 and between No 1 and Factory are larger than are justified by market conditions, and we would be glad to have your views on this subject. The Secretary will send you blank forms requesting an expression from you in the

form of a vote for our guidance, so we can consider the question at our next meeting and make some recommendation to the Association. (Vol. III, pp. 243-244.)

Memo. of Meeting, Nov. 17, 1921

Stronger Market.—Trade conditions and our statistical reports for the month of October were discussed. Clear and No. 1 Maple Flooring $1\frac{1}{2}$ " x $2\frac{1}{4}$ " face are both in a very strong position, as indicated by their oversold condition, the Clear being sold 232% and the No. 1 sold 208%. The improvement in the demand for No. 1 is particularly noticeable, as it was sold only 45% on August 1st compared with 208% sold on Nov. 1st.

In view of recent advances in the market value of rough Maple Flooring lumber and taking into account Manufacturing and Marketing Costs and the relations of supply and demand as indicated by the heavily oversold condition of Clear and No. 1, IT WAS THE CONSENSUS OF OPINION AS FOLLOWS:

1. That present market values of Maple Flooring $1\frac{1}{2}$ " are represented by Frame "A" Basis, Table of Values dated 5-21-21, at Full List for Clear and No. 1 and a concession of \$5.00 on Factory.

2. That the spread of \$7.00 between 2" and $2\frac{1}{4}$ " in Clear and No. 1 is excessive and that a spread of \$3.00 would be more representative of the difference in the intrinsic value of the two faces.

3. That the spread between Clear $3\frac{1}{4}$ " and $2\frac{1}{4}$ " be reduced from \$10.00 to \$5.00, and the spread between Factory $3\frac{1}{4}$ " and $2\frac{1}{4}$ " be changed from \$2.00 to \$5.00.

4. That the market values of Birch are equal to Maple, and that Beech Clear and No. 1 are \$10.00 less than Maple and Birch, and that Beech Factory is equal in value to Maple and Birch Factory.

5. That the Table of Values dated May 21, 1921, covering $\frac{3}{8}$ " represents the present market value of $\frac{3}{8}$ ". (Vol. III, p. 141.)

The action taken at the November 17, 1921, meeting was recommended by the Market Conditions Committee in a report dated October 28, 1921 (Vol. III, pp. 253-255), and is shown by circular letters from Mr. Keehn to the members dated November 17, 1921, and December 1, 1921, to have been used as the basis of a new "Table of Values" printed under the same date (Vol. III, pp. 142-143 and p. 318).

It is worthy of note that this was done nearly nine months after the warning was given by the Assistant to the Attorney General and the Association had by resolution pretended to revoke the Minimum Price Basis agreement, and had written the Department of Justice-their intention not to observe it. But in practice they continued to do, and are still doing, the same things they did before.

The Government filed a number of other estimates based upon varying numbers of runs made by members, which are:

- Exhibit No. 28, Vol. III, p. 291.
- Exhibit No. 28A, Vol. III, p. 294.
- Exhibit No. 28B, Vol. III, p. 296.
- Exhibit No. 28D, Vol. III, p. 300.
- Exhibit No. 28E, Vol. III, p. 302.
- Exhibit No. 28F, Vol. III, p. 304.
- Exhibit No. 28G, Vol. III, p. 307.
- Exhibit No. 28H, Vol. III, p. 310.

The first of these was dated January 29, 1915 (p. 293), and the last March 1, 1920 (p. 312). In each of them there was added 10% profit on selling prices f. o. b. mill, and to some a note was added, as, for illustration, to Exhibit 28G (Vol. III, p. 309):

To Realize a Profit of " Cost Plus " 10% (the method frequently used by the Government during the war in making its purchase contracts) instead of a 10% Profit on Sales, the profit would be \$5.63 instead of \$6.26, a difference of 63 cents; in that case the flooring manufactured in these Seven Test Runs, which have been consolidated and considered one run, should sell for \$61.97, instead of \$58.98, or \$2.99 more than selling basis of May 13, 1919.

In the estimates made during 1922 this 10% profit is omitted, and the witness Keehn says that the estimate as now made contains no element of profit. (Vol. I, p. 107.) But it will be observed that in the fifth question in the questionnaire (p. 68), from which the average manufacturing and marketing costs are estimated, there is included 6% on the value of the plant and the average stock carried

of rough lumber and of finished flooring; and, until after this action was begun, in each of the estimates 5% was added for contingencies. *But what difference can it make whether any per cent is allowed on the average estimated cost or not, when the prices upon the several grades and dimensions are manipulated at will? The advance may be far beyond 10% on those dimensions for which there is a demand and which are being sold in large quantities, and be reduced to nothing on the dimensions for which there is no demand at all.*

There is another feature which shows that this estimated cost has really but very little to do with the actual cost of flooring that is manufactured and sold upon the market. In the test runs a record is kept of the relative amounts of the different grades of rough lumber that are used, and the estimates are all based upon the *average* price of all the lumber used. *But manifestly in the operation of their mills, the relative quantity of these grades is not observed at all; and, therefore, the cost of the lumber actually used by the several manufacturers does not correspond at all with the costs upon which the estimates are based.* For instance, suppose there is a greater demand in the market for No. 1 flooring than for Clear, then the rough lumber used will be more of No. 2 Common and less of No. 1 Common; or if there is a greater demand for Factory and less for Clear and No. 1, then a very large percentage of the rough lumber used will be

No. 3 Common A; and *the estimates all show that the price of such lumber is less than half of the price of No. 1 Common.* Undoubtedly after the second estimate above cited had been sent out, there was a large increase in the quantity of No. 1 flooring produced, and but little, if any, in clear, as the great increase in the prices of No. 1, as compared with the increase in prices of clear, no doubt resulted from the increased demand for No. 1. Therefore, there was a much greater relative quantity of No. 2 rough common lumber used, and a corresponding decrease in the cost of production. And the same may be said as to No. 3 Common A rough lumber after the third price list was sent out, in which there was advised a large relative increase in the price of factory flooring.

It is apparent, therefore, that these test runs could be easily manipulated so as to show a false and excessive average cost of production by using a large amount of high-priced rough lumber. The evidence indicates that such manipulation was resorted to. W. L. Saunders testified that "Firsts and seconds, selects, and the better end of No. 1 Common rough maple lumber, are not generally used in the manufacture of maple flooring by manufacturers who produce their own lumber, because it is not profitable to do so," Vol. I, p. 197, the reason being that it can be sold on the market at prices as good as, or better than, those obtained for the best flooring. It is clearly inferable from

the evidence that there is a much larger quantity of No. 2 Common and No. 3 Common A used in manufacturing flooring than there is of No. 1 Common rough lumber, yet in the test runs upon which the four estimates heretofore referred to were based, 51.5% of all the rough lumber used was No. 1 Common, the price of which was \$39.50, while the prices of the lower grades were \$24.50 and \$11.50, respectively. And in the test runs upon which the estimates shown in Government's Exhibit No. 63-G (Appellants' brief, p. 274) were based, 53% of the entire amount of rough lumber used was No. 1 Common, the price of which was then \$64; while the prices of the lower grades were \$44, \$32, and \$24, respectively.

When consideration is given to the manner in which these "tables of values," now improperly called "average costs," have been used by defendants and other manufacturers of flooring, to the elements that enter into their computation, to the manipulation of costs to suit market conditions, to their repeated distribution among the entire membership, and to the other evidence in the record, which will be hereafter considered, no other inference can reasonably be drawn than that it is intended, and at least tacitly understood, that the costs designated in these lists are the minimum prices at which the flooring is to be sold. This inference is made doubly strong by the methods devised to accomplish such a result; and to these methods consideration will now be given.

VII

Book showing estimated freight rates and values of flooring at points of delivery

The association computes freight rates to thousands of points of delivery, and distributes among the members books which not only show such rates *but also contain the prices of lumber delivered at such designated points.* In describing the book which was prepared in 1916 the witness Keehn said:

The index letter following the name of each town indicates the rate of freight from Cadillac, Michigan, to the various points. We do not consider that Cadillac is taken exactly as the base. The rate of freight from Cadillac to about thirty or forty or fifty representative markets in the United States happens to be about the same as the average rate of freight from the seventeen producing points in Michigan and Wisconsin. In this particular book it is true that all the freight rates are estimated from Cadillac because we simply took the rate of freight from Cadillac in having it compiled. It shows the rate of freight from Cadillac to five or six thousand points or seven or eight thousand points, scattered all over the United States. (Vol. I, p. 112.)

From the whole of Mr. Keehn's testimony (pp. 112-117) it appears that the following is the method used in computing rates. Nearly all of the factories belonging to the members of the as-

sociation are situated in Michigan and Wisconsin. Three mills are located at or near Cadillac, Michigan; and the rates from that point are about the average of the rates from all of the factories to the numerous points in the United States. Therefore Cadillac is fixed as the arbitrary point from which the freight rates are computed. But the rate charged is not always the actual rate from Cadillac to the point of delivery, as Mr. Keehn testified that the rates take a certain grouping, so that the index letters representing 45, for instance, might also represent $44\frac{1}{2}$ or $45\frac{1}{2}$. (Vol. I, p. 114.)

That Cadillac has been adopted and used as a common freight basing point is shown by a number of exhibits in the record. In a letter to members dated December 7, 1917, with reference to establishing a uniform custom among the members of the association in respect to the war tax on freight charges, Mr. Keehn said:

As our delivered prices are based upon Cadillac, it would not work out to mention the rate of freight in cents per 100 pounds, because the local rate of freight from points other than Cadillac, to the point of delivery would not be according to our basis used in arriving at delivered prices. (Vol. IV, p. 433.)

And in a letter dated August 23, 1921 (six months after the association had pretended to abandon the Minimum Price Basis agreement), to the Oval

Wood Dish Corporation, which had just joined the Association, Mr. Keehn stated:

We are inclosing the following:

" 1. Minutes of Meeting of August 19, 1921.

" 2. Copy of letter to members dated August 20th, regarding the consensus of opinion as to the current market value of flooring.

" 3. *Rate Book containing Tables of Values Based upon Average Cost and index to towns showing the delivered values based upon the rate of freight from Cadillac, Mich.* Cadillac is our basing point, as it is practically the geographical center of the production and distribution of flooring and the rates of freight in a general way from Cadillac would be about the average rate of freight from all the Association flooring mills." (Vol. IV, p. 481.)

For some reason, which Mr. Keehn does not explain (Vol. I, pp. 113-114), the rates in the book are given in letters instead of figures, A representing 1, B, 2, etc., down to J, which represents O.

After the rates from Cadillac to the numerous points are thus ascertained, they and the prices of lumber, determined by the method heretofore detailed, are added together, *and the delivered price of lumber at each of the thousands of points mentioned in the rate book is thus obtained and is shown in the book.*

The system is fully illustrated by reference to Gov. Ex. 35, Vol. III, p. 328, side pages 737-905.

This exhibit is the freight-rate book which bears date of May 31, 1922, and which was compiled and distributed about that date. Only enough of this exhibit is printed to fully illustrate the character of the book. The first page, after giving the title, contains a key showing to what figures the letters correspond, and it is then explained:

To ascertain delivered costs at an unlisted point allow 25 cents for each one cent difference in the rate of freight between the nearest listed point and the unlisted point from the point of shipment. (Vol. III, side p. 738.)

Then follows the freight rates, designated in letters, to numerous points in each State, which are computed in the manner above described. For instance, in Illinois the freight rate to Abingdon is BG, or 27 cents; to Annapolis, Maryland, DD, or 44 cents; to Middletown, New York, it is DA, or 41 cents, and to all points in Massachusetts it is DC, or 43 cents. There is then given (side pages 881-882) an Average Cost Chart, which shows the average cost of the three grades and four dimensions of flooring ascertained by the method heretofore described. This chart contains costs of only Maple lumber 11" in thickness, but there also appears on side pages 878-879 a Table of Differentials, which shows the difference between the flooring described in the Average Cost Chart and—

- (1) Average cost of Beech, 13/16, All Faces.
- (2) Average cost of Birch, 13/16, All Faces.
- (3) Average cost of Wide Faces.
- (4) Average cost of Thick Flooring.
- (5) Average cost of Jointed Flooring.
- (6) Average cost of Special Grades.
- (7) Average cost of Extra Shorts.

Then follows what is designated as a "Delivered Cost Chart," which contains the delivered costs as above described of $1\frac{1}{2}$ " flooring of the several faces computed upon every rate given in the freight rate chart. For illustration, take the first item appearing on side page 883, where the freight rate is AE, or 15 cents, the delivered prices for the various dimensions of Clear flooring are \$88, \$90, \$93, and \$88.50. The delivered prices of No. 1 are: \$71, \$75, \$78, and \$78.50, respectively. The delivered prices of Factory are \$23, \$31, \$33, and \$38.50, respectively; and generally with each advance in freight of one cent, there is 25 cents added to the price, although this does not always hold good. If the manufacturer is shipping other varieties of flooring than maple or other dimensions of maple, he has to make his own computation from the table of differentials described. *Thus there is in the possession of each member the exact price which it is intended that he shall charge at the point of delivery for every shipment made by him. And not con-*

tent with this, the book specifies (Vol. III side p. 880) what the terms of sale are to be as follows:

Sixty days net or 2% discount for cash in 15 days, or 1% discount for cash in 30 days from date of invoice after deducting freight.

If the car has not arrived, the discount may be deducted on 90% of the invoice less estimated freight, for cash within proper discount period, the balance with original paid freight bill to be remitted net within 5 days after arrival of car. No cash discount will be allowed after 30 days from date of shipment.

Of course, it would be expensive to have printed and distributed books containing so much matter every time there is a change in the price. With reference to what is done when a change in price is made, Keehn testifies:

Q. Now, when another estimate of costs has been made before the issuance of another freight-rate book, what did you do?

A. Well, we might have put in a sheet or might have issued a new table of values.

Q. Well, you would do one or the other?

A. One or the other, ordinarily.

Q. That is, you would send to each member a sheet showing this new estimate?

A. New estimate; yes, sir.

Q. So he could use that in connection with his freight-rate book?

A. He could make such use of it as he desired. Simply sent to him for his information. (Vol. I, p. 114.)

The book of 1922 was made up of loose leaves; and direction was printed in the book showing how the old leaves could be removed and new ones inserted. (Vol. III, side p. 738.)

When this book was issued in 1922, Mr. Keehn, the secretary, sent out to the membership, under date of June 24, 1922, the following letter:

GENTLEMEN: 1. For the information of the members of the Association, the Committee on Cost Surveys has made a careful analysis and survey of the Average Cost of Manufacturing and Marketing Maple, Beech, and Birch Flooring.

2. The Survey was made in accordance with Article XIV, "Determining Average Cost," of the Articles of Association, and the results of the Survey are given in the inclosed schedules, which, for brevity, are called "Average Cost Chart" and "Differentials."

3. For the further information of the members, so-called "Delivered Cost Charts" have been compiled. These Charts include the Average Cost of Freight to destination of shipment; *in other words, the Average Cost of Freight is added to the Average Cost of the flooring F. O. B. cars at flooring mills to illustrate what the Delivered Cost would be at destination.*

4. Copies of the foregoing under date of May 31, 1922, are inclosed herewith.

5. We are also inclosing statement "Survey of Costs" for first quarter of 1922 and

an analysis of the "Three Test Runs of 1921," which are also dated as of May 31, 1922.

6. Under the new Articles of Association the new Rate Book will be made up as follows, and will contain only the following matter when completed:

(a) Title Page. As per enclosed copy.

(b) Key to Freight Rates and Index Letters. As per enclosed copy.

(c) Average Freight Rates and Index of Towns. Being the equivalent approximately of the freight rates from Cadillac, Michigan.

Remarks: The freight rates are all being revised to give effect to the reduction ordered by the Interstate Commerce Commission to take effect July 1st.

(d) *Average Cost Chart. Showing approximate relative Average Cost of the different grades and faces of 13/16" Maple Flooring F. O. B. cars at flooring mills.*

(e) *Differentials from Average Cost of 13/16" Maple Flooring.*

(f) *Delivered Cost Charts 13/16" Maple Flooring.*

(g) *Average Cost Chart 3/8" Maple, Beech, and Birch Flooring.*

(h) *Delivered Cost Chart 3/8" Maple, Beech, and Birch Flooring. (Vol. III, pp. 318-319.)*

Apparently the last book issued before the filing of the bill on March 5, 1923, was dated February 15, 1923, and a copy was filed as Gov. Ex. 37, Vol.

III, p. 330, side p. 910, et seq., but only enough pages are printed to illustrate its character. This book contains a table of differentials similar to those above described, and also the same directions as to terms of sale. *About 7,600 different points are designated therein* (Keehn, Vol. I, p. 118). For convenience of inspection the first three sheets of this exhibit are here reproduced as follows:

Differentials

[From Average Cost Charts of Maple $1\frac{1}{2}$ ' D. & M.]

FEBRUARY 15, 1923

Average Cost of Beech $1\frac{1}{2}$ " D. & M., all Faces:

Clear—\$10.00 less than Maple.

No. 1—\$5.00 less than Maple.

Factory—Same as Maple.

Average Cost of Birch $1\frac{1}{2}$ " D. & M., all Faces:

Clear—\$10.00 less than Maple.

No. 1—\$5.00 less than Maple.

Factory—Same as Maple.

Average Cost of Wide Faces, D. & M.:

$2\frac{1}{2}$ " face same as $2\frac{1}{4}$ " face; 3", $3\frac{1}{2}$ ",
and 4" faces same as $3\frac{1}{4}$ " face, of
same wood, grade, and thickness.

Average Cost of Thick Flooring, D. & M.:

$1\frac{1}{16}$ "—\$5.00 more than $1\frac{1}{8}$ " D. & M.

$1\frac{5}{16}$ "—\$7.00 more than $1\frac{1}{8}$ " D & M.

$1\frac{1}{2}$ "—\$10.00 more than $1\frac{1}{8}$ " D. & M., of
same wood, grade, and thickness.

Average Cost of Jointed Flooring:

$1\frac{1}{8}$ "—\$5.00 more than $1\frac{1}{8}$ " D. & M.

1 $\frac{1}{8}$ "—\$10.00 more than $\frac{1}{4}$ " D. & M.

1 $\frac{1}{8}$ "—\$12.00 more than $\frac{1}{4}$ " D. & M.

1 $\frac{1}{8}$ "—\$15.00 more than $\frac{1}{4}$ " D. & M., of
same wood, grade, and thickness.

Average Cost of Special Grades:

White Clear Maple, $\frac{1}{4}$ ", \$20.00 more
than Clear Maple, $\frac{1}{4}$ ", same face.

Red Clear Beech, $\frac{1}{4}$ ", \$20.00 more than
Clear Beech, $\frac{1}{4}$ ", same face.

Red Clear Birch, $\frac{1}{4}$ ", \$20.00 more than
Clear Birch, $\frac{1}{4}$ ", same face.

* * * * *

White Clear Maple, $\frac{3}{8}$ ", \$15.00 more
than clear Maple, $\frac{3}{8}$ ", same face.

Red Clear Beech, $\frac{3}{8}$ ", \$15.00 more than
Clear Beech, $\frac{3}{8}$ ", same face.

Red Clear Birch, $\frac{3}{8}$ ", \$15.00 more than
Clear Birch, $\frac{3}{8}$ ", same face.

Average Cost of Extra Shorts:

Clear Maple, Beech or Birch, $\frac{1}{4}$ " x 2"
or 2 $\frac{1}{4}$ " Face, under 22", \$35.00 less
than standard lengths of Clear, same
wood and face.

Clear Maple, Beech or Birch, $\frac{1}{4}$ " x 1 $\frac{1}{2}$ "
Face, under 22", \$40.00 less than
standard lengths of Clear, same wood
and face.

No. 1 Maple, Beech or Birch, $\frac{1}{4}$ " x 2"
or 2 $\frac{1}{4}$ " Face, under 16", \$40.00 less
standard lengths of No. 1, same wood
and face.

No. 1 Maple, Beech or Birch, $\frac{1}{4}$ " x 1 $\frac{1}{2}$ "
Face, under 16", \$40.00 less than
standard lengths of No. 1, same wood
and face.

TERMS OF SALE

Sixty days net or 2% discount for cash in 15 days, or 1% discount for cash in 30 days from date of invoice after deducting freight.

If the car has not arrived, the discount may be deducted on 90% of the invoice less estimated freight, for cash within proper discount period, the balance with original paid freight bill to be remitted net within 5 days after arrival of car. No cash discount will be allowed after 30 days from date of shipment.

(NOTE: Attention is called to the foregoing language. It is that of authority and not a mere suggestion.)

AVERAGE COST CHART

Average Cost of 1½" Maple Flooring F. O. B. cars at Flooring Mill

Maple D. & M.	1½" x 1½" Face	1½" x 2" Face	1½" x 2½" Face	1½" x 3½" Face
F. O. B. Mill:				
Clear.....	\$90.00	\$95.00	\$100.00	\$85.00
No. 1.....	78.00	85.00	90.00	80.00
Factory.....	30.00	40.00	45.00	50.00

DELIVERED COST CHART

Includes Average Cost of Freight to Destination—Freight Rate, 15 cents to 26 cents

Freight Rate Index	Maple D. & M.	1½" x 1½" Face	1½" x 2" Face	1½" x 2½" Face	1½" x 3½" Face
A. E.....	Clear.....	93.00	98.00	103.00	88.50
	No. 1.....	81.00	88.00	93.00	83.50
	Factory.....	33.00	43.00	48.00	53.50
A. F.....	Clear.....	93.25	98.25	103.25	88.50
	No. 1.....	81.25	88.25	93.25	83.50
	Factory.....	33.25	43.25	48.25	53.50
A. G.....	Clear.....	93.50	98.50	103.50	88.75
	No. 1.....	81.50	88.50	93.50	83.75
	Factory.....	33.50	43.50	48.50	53.75
A. H.....	Clear.....	93.50	98.50	103.50	89.00
	No. 1.....	81.50	88.50	93.50	84.00
	Factory.....	33.50	43.50	48.50	54.00

DELIVERED COST CHART

Includes Average Cost of Freight to Destination—Freight Rate, 15 cents to 26 cents—Continued

Freight Rate Index	Maple D. & M.	$1\frac{1}{2}'' \times 1\frac{1}{2}''$ Face	$1\frac{1}{2}'' \times 2\frac{1}{4}''$ Face	$1\frac{1}{2}'' \times 2''$ Face	$1\frac{1}{2}'' \times 3\frac{1}{4}''$ Face
A. I.	Clear.....	93.75	93.75	103.75	89.25
	No. 1.....	81.75	88.75	93.75	84.25
	Factory.....	33.75	43.75	48.75	54.25
B. J.	Clear.....	94.00	99.00	104.00	89.50
	No. 1.....	82.00	89.00	94.00	84.50
	Factory.....	34.00	44.00	49.00	54.50
B. A.	Clear.....	94.25	99.25	104.25	89.75
	No. 1.....	82.25	89.25	94.25	84.75
	Factory.....	34.25	44.25	49.25	54.75
B. B.	Clear.....	94.50	99.50	104.50	90.00
	No. 1.....	82.50	89.50	94.50	85.00
	Factory.....	34.50	44.50	49.50	55.00
B. C.	Clear.....	94.50	99.50	104.50	90.25
	No. 1.....	82.50	89.50	94.50	85.25
	Factory.....	34.50	44.50	49.50	55.25
B. D.	Clear.....	94.75	99.75	104.75	90.50
	No. 1.....	82.75	89.75	94.75	85.50
	Factory.....	34.75	44.75	49.75	55.50
B. E.	Clear.....	95.00	100.00	105.00	90.75
	No. 1.....	83.00	90.00	95.00	85.75
	Factory.....	35.00	45.00	50.00	55.75
B. F.	Clear.....	95.25	100.25	105.25	90.75
	No. 1.....	83.25	90.25	95.25	85.75
	Factory.....	35.25	45.25	50.25	55.75

KEY

Freight Rates 1 2 3 4 5 6 7 8 9 0
Index Letters..... A B C D E F G H I J

Then followed a list showing the delivered price or "cost" of certain kinds and grades of flooring at the 7,600 points in the United States.

It was this book that was in use when the bill in this case was filed. But Mr. Keehn claims that there has been a modification of the information thus sent out since the bill was filed and before the trial. He says the book now in use does not show the delivered cost; that is, the items of freight and the cost of the manufacture and distribution are

not actually added together. But both items are contained in the book, and all the shipper has to do is to make the addition. As said by the court, "In other words, instead of having a four, he (the manufacturer) has two and two." (Vol. I, p. 118.)

Kechn also claims that the rate book or tables do not now include the differentials and terms of sale. (Vol. I, p. 153.) But he admits that the terms of sale prescribed have generally prevailed in the lumber industry (Vol. I, p. 155), and the differentials as to 70% or 80% of the business are shown in the reports sent to the members (Vol. I, p. 177). And the estimates of so-called costs of production and distribution heretofore fully described are still made and distributed; and they show the prices of all maple flooring, which represents 90% of the business. (Kechn, Vol. I, p. 131.)

Special attention is called to the fact that in the books issued in 1922 and 1923 the tables of delivered prices are designated as "*Delivered Cost Chart.*" Prior to that time these tables had been designated "*Table of Values.*" See Table issued January 6, 1921 (Ex. 34, Vol. III, p. 322, side p. 554, et seq.). In this book, after the "Concessions and Additions—Table of Values January 6, 1921," appears the statement "*Established for First Quarter, 1921.*" (Side p. 694.) These words were used advisedly, and refer to the values, terms, etc., "*established*" under the minimum-price plan and the minimum-price basis. It was under those plans

that the delivered prices were *fixed*; and they were therefore designated as "values" and not "costs." Apparently in these charts, the delivered prices were not designated as "*values*" before 1916, the date when the minimum price plan originated. On p. 320, side pp. 419 and 420, appears a number of pages of a book dated May 21, 1913, which is improperly designated as "Gov. Exhibit 26," but which is probably a part of Gov. Exhibit 30 f. They show delivered prices, but are not designated "Tables of Values," as appears in the table issued May 15, 1916. (Side pp. 513, 514-521.)

But whether called "Table of Values" or "Delivered Costs Chart" they contained the same information, and were distributed for the same purpose, i. e.: to enable the members to observe a minimum selling price; and they accomplished the same result.

A method of determining the freight rate which the members have included in the price of flooring has been in existence ever since the first association was organized in 1905. Mr. Keehn says, "I was connected with the association on April 1, 1905. I am very familiar with this paper 'Prices on Maple Flooring, effective April 1, 1905.' * * * It is what it purports to be. * * * Tables of prices on maple flooring by geographical zones." (Vol. I, p. 111.) The document spoken of is filed as Gov. Ex. 29. (Vol. III, p. 320, side p. 408, but improperly numbered

498.) That was a simple document as compared with subsequent tables; but it showed the prices which were expected to be charged for lumber delivered at various points in the United States. Some specific points were mentioned, but generally a specified delivered price applied to all, or the greater portion of a state. It appears, however, that by 1911, a table of the nature of those used in recent years and now in use had been developed. (See Gov. Ex. 30E, Vol. III, p. 320, side p. 417.) And in 1913 the system had about reached perfection. (Gov. Ex. 30f [not 26] Vol. III, p. 320, side pp. 418, 419.)

That those producing and selling an article may observe uniform prices or a minimum price, and thus avoid competition, it is essential that some method be devised whereby they can easily ascertain what the delivered prices of the article are at the various points to which the commodity is shipped.

Different methods have been invented, but this court has so far had presented to it no method so complete in all of its details as the one adopted by this association. *Here in most instances no computation was left to be made by the manufacturer; and all he had to do was to turn to his book and find the point to which the shipment was destined, and he had the price before him.*

That the association rate books have in fact been used by members as price lists is shown by the depo-

sition of Ralph A. Brown, who has been engaged since 1910 in selling flooring in New York City as a mill representative and wholesaler. Mr. Brown was manager of the New York office of the Strable Lumber and Salt Company from 1910 to 1917; and from 1917 until he became connected with the John A. Daly Lumber Company, a wholesaler, he continued to represent the Strable Company, but on a commission instead of a salary basis. The Daly Company handles principally the stock of the Strable Company and of the Holt Hardwood Company. (Vol. II, pp. 569-570.) Mr. Brown testified:

Q. During the time that you have known of the existence of the Maple Flooring Manufacturers Association, have you known of the activities that association has carried on?

A. No, I have not been very familiar with their activities, except that they issue a price book and rate book, which practically everybody uses, to determine delivered prices in various parts of the country.

Mr. JOHNSTON. You are referring to the freight rate book?

The WITNESS. Yes, sir.

Q. It is what is called a table of values?

A. Yes, sir; a table of values.

Q. Is that list furnished to you?

A. Yes, sir.

Q. By the companies which you represent?

A. Yes, sir.

Q. Do you know whether or not that list is furnished to representatives of other com-

panies with whom you are in competition here?

A. I do not know definitely, but I presume it is.

Q. When you have spoken of prices being cut or your cutting prices in order to obtain business, you mean cutting the prices in the rate book or that table of values?

A. Well, it might not be necessarily cutting the prices in the table of values, because that is gotten out and used as a basis—so much over or long base; and if the market prices were over list we might cut down the prices, but they would still possibly be above the list in that book. You can see what I mean; that is, sometimes these lists would go along for months and, to save printing, they would just say “add” or “deduct” so much from list. That simplified sending out a lot of price lists every little while. (Vol. II, p. 575.)

This last paragraph above of Mr. Brown's testimony undoubtedly refers to the Tables of Concessions and Additions which the Association sent out from time to time prior to 1922.

If it was not intended by the members that the prices of lumber should be controlled or in some way affected by this organization, why was each member furnished with a list of fixed or designated prices at innumerable points in the United States? What did prices at those points have to do with the cost of production? To say that these elaborate calculations and their distribution among the

members were not intended to have, and did not have, any effect upon the prices charged by the members is to disregard absolutely the well known relationship between human motive and the actions that result therefrom.

VIII

Exchange of Statistics

The most effectual device yet invented to keep competitors in line as to prices is the exchange of statistics which show the prices each has been charging in sales actually made.

In the Articles of Association in existence from January 1, 1913, to January 1, 1919, the article relating to statistics provided that reports should be made by each member to the secretary at the close of business each day of all deliveries and shipment of all kinds of maple, beech, and birch flooring within the United States, except flooring purchased from members of the association; and the secretary was given authority to examine the books and papers of the members to verify statements; and it was also required that a sworn statement showing total deliveries and shipments for each month should be rendered on or before the fifth of the following month (Vol. III, p. 7); *but there was no provision made for the distribution of statistics by the secretary among the members of the association.* The articles which were in existence for the first three months in 1919 had a simi-

lar provision (Vol. III. pp. 20-21). The articles relating to statistical reports in the Articles of Association which went into effect January 1, 1922, and continued until January 1, 1925 (Vol. III, p. 64), have heretofore been copied in full (p. 56); and, briefly stated, they provide that each member shall report monthly on or before the fifth day of each month (a) stocks on hand of the three varieties of flooring; (b) unfilled orders; (c) amount in feet of shipments made during the preceding month within the United States except purchases made from other members; (d) production for previous month; (e) new orders booked during month; and (f) average prices f. o. b. flooring plant for 13/16" x 2 1/4" Clear, No. 1 and Factory; and that each member shall report promptly *at the end of each week* all sales made during the week of the three varieties of flooring, the reports stating quantity, kind, and grade of flooring sold, the delivered price at which sold, the average freight rate to destination, and the commission paid, if any; and that all the statistical reports shall relate solely and entirely to past and completed transactions and shall be mailed "by the members to the Secretary, *who shall report the same to the members.*" (Vol. III, p. 70.)

Monthly statistical reports of stocks on hand, of unfilled orders, of shipments, of production, and of average prices realized have apparently been made by the association to its members at least since January, 1912. (Government Exhibit No. 40, Vol.

III, side pages 956-960.) The earliest such report printed in the record is dated January 18, 1913. (Gov. Ex. 40A, Vol. III, side pages 1003-1009.) This report gives practically the same bare statistical information as does the report dated April 17, 1923, which is fully described below (p. 114); but it does not give the information in as great detail as does the later report; nor does it contain any of the elaborate comparisons in percentages and by the graphic representation, called a barometer, which the later report makes between the current statistics and those for earlier months and years.

With the exception of a few months during 1914 and during 1916, when an exchange of quotations was operated through the association (Vol. III, pp. 209 and 227, and Vol. IV, p. 430), no detailed reports of actual prices were furnished the members by the association until the weekly sales reports were started in 1920. During this period the only reports of actual prices were the monthly reports of average prices f. o. b. cars at the factory of 1 $\frac{1}{2}$ " x 2 $\frac{1}{4}$ " face maple flooring. Specimens of these reports, then called Current Net Values, dated January 18, 1913, October 28, 1913, and September 19, 1916, are printed in the record. (Vol. III, side pages 1004, 2130, and 1322.) The earliest of these reports merely gives the average price realized for five groups of mills and the general average; but the later reports are in the same form as the report of Average Prices Realized, dated April 17, 1923, which is described below (p. 115).

Mr. Keehn says that he doesn't recall exactly when the weekly reports of sales were started, but that it may have been some time in 1920. (Vol. I, pp. 176-7.) The minutes of the annual meeting held February 12, 1920, establish definitely, however, that the collection and distribution of weekly reports of sales were authorized at that meeting. The pertinent portion of those minutes reads as follows:

Weekly Sales Reports.—In view of the extraordinary business conditions now existing, it was the sense of the meeting that weekly reports of sales should be made in order that the members of the Association may have as much information as possible regarding current market conditions.

On motion the following resolution was adopted by unanimous vote:

“*Resolved*, 1. That the members make reports to the Secretary on Saturday of each week, giving a complete record of all sales made during that week of one carload or more of Maple, Beech, or Birch Flooring, the reports to give date of sale, quantity sold (if one carload or more), the thickness, face, grade and wood, the delivered prices sold at, and the Rate Book index letters to indicate destination, but the names of towns to be omitted.

“2. The information contained in the reports to be tabulated by the Secretary and exchanged by him among the members only who make the reports.” (Vol. IV, p. 528.)

The earliest weekly sales report secured under subpoena and introduced as evidence is dated March 2, 1920, but it indicates that similar reports had been issued for at least several weeks preceding that date. (Vol. III, pp. 356-359.)

Because of the decision in the United States District Court at Memphis in the Hardwood Case, on advice of counsel the entire reporting system was suspended from April 1, 1920, to August, 1920. (Vol. I, pp. 146-7.) The weekly sales reports were also omitted for a few weeks in December, 1921, and January, 1922, because of the decision of the Supreme Court in the same case. (Vol. III, p. 152.) The Government filed as exhibits statistical reports which cover practically the entire period from 1913 to 1923, and weekly sales reports which cover practically every week of the period from January, 1921, to October, 1923, but has had printed only a sufficient number to fully illustrate the entire reporting system from its inauguration down to the present time. As we are now especially concerned with the manner of reporting at the time the original bill was filed, we call special attention only to such reports as illustrate the system then in use, and also to one or two reports made since the filing of the bill which indicate the slight change which Mr. Keehn claims has been made in the system since that time.

Government Exhibits 44 to 48, inclusive (Vol. III, p. 404, side pp. 2852-2858), are forms for in-

dividual reports to be made by members to the secretary of the association. The first form (Exhibit 44) is for a report showing (1) date, (2) quantity, (3) thickness and face, (4) grade, (5) wood, (6) delivered price at which sold, (7) average freight rate to destination, and (8) rate of commission paid, if any, as to each shipment, and at the bottom the member is asked to report every Saturday, and if no sale has been made during the week, to send the blank in with such notation. (Vol. III, side p. 2852.) Government Exhibit 45 is a form for reporting the average prices realized f. o. b. plant $1\frac{1}{8}$ " x $2\frac{1}{4}$ " face Clear, No. 1 and Factory maple flooring, and it shows the number of feet, the delivered price, the quantity, and freight to destination of each grade (side p. 2853). Exhibit 46 is a form showing (1) maple flooring on hand of each dimension and grade and (2) the unfilled orders on hand of each dimension and grade (side p. 2854.) Exhibit 46A gives similar information with reference to beech flooring, and Exhibit 46B the same with reference to birch flooring (side pp. 2855 and 2856). Exhibit 47 is the form of a report showing the amount of production of each grade and new orders booked for each variety of flooring, and Exhibit 48 is a summary of shipments showing quantity of each variety shipped (side pp. 2857 and 2858). Exhibit 44 is a weekly report, while the remainder are reports made at the end of each month.

From the information obtained by these reports the secretary compiles the information which he sends out to the various members.

Government Exhibit 43-FFF (Vol. III, pp. 377-384) is the report of all sales made by every member during the week ending April 1, 1922. As heretofore shown, this was sent out to each member about the middle of the following week. It is dated April 6, 1922. This report shows the date of each sale, the exact quantity of each dimension and grade, the delivered price, the Cadillac freight rate, the commission allowed, if any, and the member by which the sale was made, the member being indicated by its identification number. Government Exhibit 43-ZZZZZ (Vol. III, p. 390) is the report for the week ending July 14, 1923. *It was made nearly four and a half months after the bill was filed, and is in precisely the same form as the one made for the week ending April 1, 1922.* But Mr. Keehn says that at the meeting held July 19, 1923, the form of this weekly report was so changed that it no longer identifies the particular mill reporting each sale. Government Exhibit 43-AAAAAAA (Vol. III, pp. 398-402), the report distributed among the members for the week ending July 21, 1923, which is the first report made after the alleged change, contains exactly the same information as the previous reports except that the number of the member reporting each sale is omitted, but in this report the groups of mills are designated so as to show that

the first ten sales were made by members of eastern lower Michigan mills, that the next eight sales were made by the western lower Michigan mills, and the remaining seven were made by the Upper Michigan and Wisconsin mills.

It appears from defendants' exhibit G I (Vol. IV, side pp. 5340-5342), a weekly sales report dated November 9, 1923, that other changes in the form of the report were made between July 27, 1923, and that date, as the later report has a different grouping system, which is described below (p. 113), and also the July, 1923, reports have the following additional information appended, which does not appear in the report dated April 6, 1922:

Averages of Sales Week Ended November 3, 1923

	Clear	No. 1	Factory
$\frac{11}{8}$ x 2 $\frac{1}{4}$ " face Clear, No. 1 and Factory Maple Flooring, Standard Grades and Lengths:			
Averages of Delivered Prices.....	\$98.62	\$87.57	\$52.58
Averages of Average Freight Rates.....	.29	.26	.32
Average Cost of Freight.....	5.80	5.20	6.40
Averages of Prices Realized F. O. B. Flooring Mill Basis.....	92.82	82.37	46.18

Total Sales of $\frac{11}{8}$ x 2 $\frac{1}{4}$ " Face Maple Flooring

Clear.....	620 M feet.
No. 1.....	416 " "
Factory.....	260 " "
Total.....	1,296 " "

(Vol. IV, side page 5342.)

In fact the reports had formerly separated the sales according to the geographical groups of members. The sales reports dated March 2, March 16,

and April 20, 1920 (Vol. III, pp. 356-367), separated the sales made according to the groups of the members, but did not show the individual member making each sale. The reports dated January 13, January 20, January 27, 1921, February 3, 1921 (Vol. III, pp. 261-276), and October 6, 1921 (Vol. III, side pp. 2394-2396), gave the identification number of the member making each sale and also separated the members according to groups, although in the last-mentioned report the separation into groups was only indicated by lines across the report. The small volume entitled "Additional Exhibits" contains weekly reports distributed by the secretary beginning with the week ending March 4, 1922 (p. 1), and continuing to the report dated February 24, 1923 (p. 41), although reports are not printed for all the weeks. In the first of these reports the mills were divided into groups, but in the report for the week ending May 20, 1922, and in the succeeding reports they were not so divided. Manifestly the resumption of this division after it had been determined to omit the number of the member reporting was to enable the members to identify as nearly as possible the members by whom the sales were made.

Until some time after July, 1923, the several groups and the numbers of the members in each group were as follows:

Grouping prior to July, 1923

Eastern lower Michigan mills	Western lower Michigan mills	Upper Michigan and Wis- consin mills
2	3	4
24	5	7
33	14	1 23
49	26	1 34
	30	42
	37	44
	47	1 45
		1 50

¹ Wisconsin.

One of the pages of the Monthly Barometer Report for September, 1923, dated October 19, 1923 (Vol. III, side p. 2863), shows that after the use of the identification numbers was abandoned, the Upper Michigan mills and the Wisconsin mills were placed in separate groups, and another page of the same report gives in a footnote the following explanation of the present grouping system (Vol. III, side p. 2866) :

Group 1. Eastern Lower Michigan Mills.....	4
2. Western Lower Michigan Mills.....	6
3. Upper Michigan Mills.....	4
4. Wisconsin Mills.....	4
5. Chicago, St. Paul, Tapper Lake Mills.....	3
Total Mills.....	21

The record does not contain any statement as to the present grouping of the members, but it appears quite obvious that No. 47, William Horner, with a plant at Reed City in the Upper Peninsula of Michigan, has been transferred to the Upper

Michigan group, and that the members constituting each group are now as follows:

Grouping after July, 1923

Eastern lower Michigan mills	Western lower Michigan mills	Upper Michigan mills	Wisconsin mills	St. Paul, Chicago, Tupper Lake
2	3	7	23	22
34	5	42	34	45
33	14	44	45	51
49	26	47	50	
	30			
	37			

The creation of a separate group for the Wisconsin mills, so that one group only includes three mills, three groups only include four mills apiece, and the other group only includes six mills, must render it comparatively easy for any person well acquainted with the industry to determine with reasonable accuracy which member has made each sale reported.

The monthly reports are illustrated by Government Exhibit 40-5R (Vol. III, p. 350, side pp. 2049-2059). The first page is entitled "Stock Conditions and Barometer for March, 1923," and is dated April 17, 1923. It gives a complete analysis of current market conditions. The first table on the page gives the percentage sold of the available stock of maple, beech, and birch flooring; of maple flooring; and of maple 2¼" flooring; and of each grade of each of those three varieties as of March 31, 1923, March 1, 1923, and March 31, 1922, and the second table gives the increases in

the percentages sold (stated as "points up") of the three varieties of flooring, of maple flooring, and of maple 2 $\frac{1}{4}$ " flooring as compared with the same day the preceding month and with the same date the preceding year. Under these tables there is a column of statistics showing stocks on hand, unfilled orders, shipments, production, and new orders booked, on March 31, 1922, and March 31, 1923, and showing as to each the increase or decrease both in actual amounts and in percentages. At the bottom of the page is a comparison of the average values of 1 $\frac{1}{2}$ " x 2 $\frac{1}{4}$ " face Clear, No. 1 and Factory Maple Flooring for March, 1922, and March, 1923, and the increase stated both in dollars and in percentage. On the right-hand side of the page are seven columns which illustrate the stocks and unfilled orders on hand March 31, 1923, and the shipments, the production, the new orders booked, and the average values for March, 1923, compared with March, 1922.

The second page of this exhibit shows the following data as to each member individually for March, 1922, and March, 1923, to wit: "Stocks on Hand," "Unfilled Orders," "Shipments," "Production," "New Orders," and "Stock Changes," and the increase or decrease as to each. The third page is a record of the average prices realized f. o. b. flooring mills for new orders booked for 1 $\frac{1}{2}$ " x 2 $\frac{1}{4}$ " Clear, No. 1 and Factory maple flooring, standard grades and lengths, after deducting freight, the members

there appearing in groups and the average price being given for each member and for each group. On the next page appears, first, "Shipments of each wood March, 1922-1923," showing the increase, both actually and in percentage; second, "Production by Grades" of each variety of flooring and of all three varieties for the years 1916 to 1922, the average yearly production for that period, and the production for March, 1923; and, third, the average prices realized f. o. b. Michigan and Wisconsin mills for 11" x 2¼" face maple flooring, after deducting freights and commissions, for each of the three grades, and for the product, for March of each year 1916-1923, and the averages for that period, and also for March, 1923, and a comparison of the figures for March of each later year, with March, 1916, as 100% (side p. 2052). The next page shows, first, flooring of each grade and dimension, all varieties, on hand March 31, 1923, and, second, unfilled orders on hand March 31, 1923, for each grade and dimension (side p. 2053).

Side page 2054 shows, first, maple flooring of each grade and dimension on hand March 31, 1923; and second, unfilled orders for maple on hand March 31, 1923. Side page 2055 shows the surplus maple flooring stock on March 31, 1923, of each grade and dimension. By "surplus" is meant an excess of 100,000 feet. Page 2056 shows maple flooring surplus in M feet March 31, 1923, and also

the "Summary of Surpluses." Page 2057 shows first, beech flooring on hand March 31, 1923, giving each grade and dimension, and second, unfilled orders for beech on hand. Page 2058 gives the same information with reference to birch flooring, and page 2059 is a record of the receipt of March, 1923, reports, and shows the date of the receipt of each report of stocks and unfilled orders, shipments, production and new orders, and average prices realized. Monthly reports for other dates are printed, but a study of those cited as Exhibit 40-YYY (Vol. III, p. 346, side p. 1620-1629), which is for May 17, 1919, shows that there is no substantial difference in their contents.

Exhibits 40 and 41-2 U (Vol. III, side pages 991-996 and 2107-2108) are respectively the Annual Statistical Report for the year 1921, dated February 17, 1922, and the Semi-Annual Statistical Report for the first half of 1923, dated July 14, 1923. It is not necessary to describe these reports in detail as they are in the same general form as the monthly report. Briefly stated, they summarize and consolidate the monthly statistics and compare the totals and the averages for the half year and the year with the statistics for the first half of the preceding year and with the preceding year.

An analysis of the reporting system clearly shows that there is no information withheld by one member from another; and that everyone is perfectly familiar, not only with summaries which show

market conditions generally, but also with the exact condition of the business of each of his fellow members.

The reporting system here in effect is more complete in its details than that used by the Hardwood Association, which organization was held to be illegal in *American Column & Lumber Company v. United States*, 257 U. S. 377.

Oral Testimony as to Value of Reporting System

The importance that is attached by the members to the information contained in these reports is not a matter of conjecture or inference, as the witnesses in this case have testified with an unusual degree of frankness upon the subject. This will appear from the following citations and quotations from the evidence of a number of the witnesses:

J. L. Colby, of Cummer-Diggens Company, after being cross-examined at length upon the subject (Vol. I, pp. 215-218), on reexamination says: "I don't want to give anyone the impression that we don't pay any attention to the statistics distributed by the association. I do want to state that the statistics are not the primary consideration with us " (pp. 221-2) ; and to the question " Why is that price always exchanged between you members if it is not worth anything?" he answered, " It is a matter of statistical information, some members might consider it worth more than others. I assume that the member can consider it or not just as he likes when he gets it." (Vol. I, p. 224.) This witness

probably was the least willing of all the witnesses to admit the manifest use of the statistics made by the members.

Mr. McLurg, of Kneeland-McLurg Lumber Company, testified as follows:

Q. You say, Mr. McLurg, that you consider those statistics when you go to make up prices?

A. Yes, sir.

Q. Are you the sales manager?

A. No, sir.

Q. You consider them pretty carefully, don't you?

A. I don't. My sales manager watches them. I pay very little attention to the selling.

Q. You examine and consider those weekly sales reports?

A. He does; yes, sir.

Q. And they show the prices?

A. Yes, sir.

Q. At which the sales were made?

A. Yes, sir.

Q. And you regard that as of value?

A. *Very valuable.*

Q. And you also regard it as very valuable, the reports as to production?

A. Not so much production as I do stocks on hand.

Q. Stocks on hand.

A. I don't care so much about production as I do with what they have on hand.

Q. Why is that valuable if it does not enter into the making of the price?

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Q. Stocks on hand.

A. I don't care so much about production as I do with what they have on hand.

Q. Why is that valuable if it does not enter into the making of the price?

A. *I said it did enter into my making the price.*

Q. If those statistics showed that those competitors were getting a good, big, high price, why, you follow, don't you?

A. If our stocks are such that we can, and if they are low, we buy from them, try to find out who it is and buy some stock.

Q. But if they get a good high price, you follow, don't you?

A. We try to get all we can; yes, sir.

Q. Well, you follow them?

A. We don't follow that as a lead.

Q. If they get a higher price than you do, you try to follow them, don't you?

A. Try to get all we can for our stock.

Q. *Mr. McLurg, if they are selling higher than you are, you try to follow them, don't you?*

A. *Yes, sir.* (Vol. I, pp. 229-230.)

Mr. DeWitt, of Holt Hardwood Company, when asked on examination in chief what the advantages of being a member of this association were, said:

Well, one of the big advantages is the statistical reports that we get; it enables us to find out what the market is doing, and as I testified before on that, then we can put the proper grade of lumber into our mills to produce the grade of flooring that is demanded by the market, and it is not only an advantage to the manufacturers but it is also an advantage to the consumer. If we did not do that, there would be times when there would be a great shortage of some

particular kind of flooring; naturally the price of that would be high and the consumer would suffer, but from the fact that we have that information it gives us a chance to keep our stock pretty well balanced with the requirements of the market; *also that same report gives us the prices being obtained by other members of the association; although that information is generally about two weeks old when we get it, it is valuable to us.* The standardization has been a very valuable thing. (Vol. I, p. 252.)

And on cross-examination this witness said:

Q. And that is the very reason you take those statistics, isn't it; you want to know what your competitors are getting for their lumber?

A. That was one of the reasons.

Q. Well, that is your main reason, isn't it?

A. No; the other parts of the statistics are also very valuable to us as I have already testified.

Q. It is all valuable.

A. It is all valuable, that part too.

Q. *When you go to make your price you consider all those statistics, don't you?*

A. *Yes, sir.*

Q. *And you fix the price very considerably by what you learn from these statistics, don't you?*

A. *That is one of our sources of information.*

Q. *An important one, isn't it?*

A. *Important one; yes.* (Vol. I, p. 257.)

Mr. Shepeck, of I. Stephenson Company, Trustees, on examination in chief testified:

The statistics issued by the Association are a big benefit to us. The information that we gather from these statistics as to stocks on hand, production, new orders booked, also the weekly sales reports, are of considerable benefit to us. They enable us to form an opinion as to what the conditions are and assist us in intelligently handling our flooring business.

Q. How do you handle your flooring business, whether you consider present prices or future prices, or both?

A. We are concerned with both. (Vol. I, p. 264.)

And on cross-examination he testified:

Q. Isn't your dollars and cents in the price which you are able to make on account of these statistics, there are your dollars and cents?

A. Sometimes the statistics cost us money, in order to get out.

Q. How do you lose money out of these statistics?

A. I feel pretty good sometimes, until the statistics come along, and then I feel sick and cut my price.

Q. If you didn't get the sickness you might have to cut more; sickness helps you in that case. If it wasn't for the statistics you wouldn't belong to that Association right now?

A. *No; I don't think we would; we might.*
(Vol. I, p. 266.)

And again:

Q. But anyway, you do say that these statistics showing demand and supply and stocks on hand and all those things, and prices paid, *are of very great value to you?*

A. *Yes, sir.*

Q. And, of course, that means that they are of great value to you in that they enable you to get more money out of your lumber?

A. Not necessarily; no, sir.

Q. Isn't that what you are striving for, to get more money for your lumber?

A. To a certain extent; yes, sir.

Q. Would you be in business if it was not for the money you get out of it?

A. No, sir.

Q. You are striving for profits?

A. Yes, sir.

Q. And that is all you are striving for, profits?

A. Oh, not entirely; no.

Q. You are not doing it for exercise, are you?

A. No.

Q. Or amusement; you could get amusement somewhere else?

A. I get amusement out of my business.

Q. You are just the same as other men in business; you are in business to make money out of it?

A. Yes, sir.

Q. And the thing that is valuable to you is that which enables you to make more money?

A. It enables us to keep from going broke.

Q. That is the same thing?

A. Yes; to a certain extent.

Q. That is, it keeps you from losing money?

A. Yes, sir. (Vol. I, p. 267.)

Mr. Hodges, of the Oval Wood Dish Corporation of Tupper Lake, New York, who is the only member in or near that locality, testified in chief:

I think the statistics that are furnished our Company by the Secretary of the Maple Flooring Manufacturers' Association are very valuable.

The weekly reports are valuable as showing a trend of the market, whether the prices are going up or going down and another valuable feature is the amount of sales, that enable us to know approximately how much of each grade, for instance, has been sold within a certain time.

Q. Do you regard the prices there more or less important than the statistics with regard to volume?

A. I think the statistics in respect to volume are fully as valuable as the price statistics, because oftentimes it does not matter to me what somebody in Michigan is getting in prices; if I know my competitor who lives eleven miles from me is getting two dollars less than my figures show, that

would influence me more than what I might see in the sale reports. (Vol. I, p. 291.)

And again with reference to making prices:

Well in the first place I think I would take into consideration the economic situation, that is, the general trend of the market, whether it was up or down, and then I would take into consideration my own particular stock conditions. If I had a surplus of some one item and wanted it moved, why I would be apt to make a lower price, *particularly if I saw that some one else was making a lower price on that same item.* On the other hand, if the general trend of the market was upward and I had no accumulation of that stock *and I saw somebody was getting more money than I was, it may tend to influence me to raise my prices.* (Vol. I, p. 292.)

And—

The mere fact that some one else was charging higher prices or lower prices than I had been would not automatically cause me to lower or increase my prices. I would consider my own stock and the other conditions above mentioned. The fact that some one else was charging higher or lower prices than I was would be considered as one factor and would be given consideration by me. (Vol. I, p. 293.)

On cross-examination this witness said:

Q. Now, in regard to those statistics, didn't you join this Association very largely

to get the information that is contained in those statistics?

A. Yes, sir.

Q. Don't you use it all the time?

A. What do you refer to?

Q. I mean all the statistics; don't you use them all?

A. Why, yes; certainly.

Q. Aren't you studying them continually with reference to your changing prices?

A. I wouldn't say that; but we do study them; we look them over wherever we get them and take them into account. *That is one of the factors that determine our price.*

Q. If it wasn't for those statistics you wouldn't belong to the Association, would you?

A. *I don't think so; it would be of no value to us.* (Vol. I, p. 300.)

Mr. Ralston, formerly Sales Manager for the Receiver of William Horner, in chief testified:

A. The Statistics, as a rule, *are very, very, valuable*, especially as regards the production and the stocks on hand and the general information given in these statistics that we received from time to time. (Vol. I, p. 324.)

And on cross-examination he testified as follows:

Q. You said these statistics that you get from the Association you regard as very valuable?

A. In the main; yes.

Q. And you emphasized the "very"—as a matter of fact, you repeated it. You re-

gard that as one of the most valuable activities in which the Association engaged, don't you?

A. The statistics?

Q. Yes.

A. Yes; as to costs and production, and etc.

Q. Taking statistics as a whole, regardless of prices and production?

A. I said before that there are some features of those statistics that I don't regard of any value at all, and never did.

Q. And there are some other features that are more valuable than other features?

A. Absolutely.

Q. And of course those statistics are valuable in that they aid you in getting more money for your lumber?

A. For our flooring?

Q. More money for your flooring?

A. Some cases, and some cases the opposite.

Q. If it didn't aid you in getting more money for your flooring, they wouldn't be of any value, would they?

A. There is something in that; true.

Q. Isn't that absolutely true?

A. Not always. (Vol. I, pp. 329-330.)

Mr. Klesner, the representative of the receiver for William Horner, testified as follows on cross-examination:

Q. If you were selling at 90 and they were selling at 95, and you got the information through that report of the fact that they

were selling at 95, you would go up to 95 at once, wouldn't you, or you will go at least to 94?

A. Well, possibly.

Q. Well, wouldn't you do it, isn't that common sense?

A. Yes; that is common sense.

Q. Why, of course, and that is the way you run your business, isn't it?

A. I will tell you, as I say, we pay very little attention to the report; we are simply governed by the market conditions, the price for lumber, the cost of manufacture, we try to get as near that price as we can, but if we can't get our price and we have to meet legitimate competition, naturally we do it if we need the business.

Q. *When you speak of market conditions the price is a part of the market condition?*

A. Yes, sir.

Q. *And the price revealed in those statistics is a part of the market conditions, isn't it?*

A. Yes, sir.

Q. *And the stock on hand is a part of the market conditions; that is true, isn't it?*

A. Yes, sir.

Q. *That is, the stock that belongs to everybody else and the stock that you have got is a part of your market conditions?*

A. Yes, sir.

Q. *And you are controlled by all of those things; as a matter of fact, you are controlled by the stock on hand and the price at which*

the flooring is moved—that is the fact, isn't it?

A. That is the fact.

Q. And all those things are revealed by those statistics, aren't they?

A. Yes, sir. (Vol. I, p. 338.)

Mr. Greene, of the West Michigan Flooring Company, after a lengthy cross-examination upon the subject, said:

Q. Let us see about working both ways. As a matter of fact you always want to get all you can for your lumber?

A. We are in the business for that purpose.

Q. And now after you get those reports, and those reports show, say, that you are selling at 95 and that your competitors are selling at 90, just as long as you can get 95 you will get it, won't you?

A. I presume I would; yes, sir.

Q. Yes; of course you will; never come down until you have to, of course.

A. But it is fair to say——

Q. Is that true?

A. I come down to meet market conditions.

Q. You never come down until you have to, until pressure is brought to bear on you from the demand; isn't that true?

A. That is usually immediately; yes, sir.

Q. Whether it is usual immediately or not, just as long as you can get your 95 you are going to get it, aren't you?

A. Yes, sir.

Q. But if you examine those reports and you are selling at 90, and they are selling at 95, you immediately are going to get your 95 if you possibly can, aren't you?

A. Not necessarily, if my stock condition does not warrant it.

Q. Not necessarily, but you are going to get it if you can, aren't you?

A. Within a period of time; yes, sir.

Q. Just as quick as you can?

A. I presume so.

Q. Don't you know? You run your business that way to get all the money you can out of it?

A. Yes, sir. (Vol. I, p. 391.)

Mr. Dewey, of Bigelow-Cooper Company, described his use of the statistics as follows:

I analyze the statistics that are furnished us from time to time by the Secretary of the Association so as to get as intelligent an idea as possible of the condition of the industry. These statistics throw a great deal of light on that subject. I use the statistics in the same way as I use other information regarding general conditions. I prefer light rather than darkness, so far as business conditions and the conditions of the industry are concerned. (Vol. I, p. 397.)

The exhibits introduced in evidence by the Government also contain many statements showing the great value and importance attached by the members to the information contained in the statistics, and especially in the price statistics, furnished to

them by the association. As stated heretofore, no detailed reports of sales were furnished to the members until March, 1920; and the statements made prior to that date with reference to the current net-values reports, which were monthly reports of average net prices f. o. b. mills and to their effect in stabilizing, maintaining, and increasing prices, must be much more applicable to the effect of the present detailed weekly reports of individual sales. Some of these statements are as follows:

Market Conditions Committee Report, December 19, 1918

As the present method of reporting Current Net Values was adopted by the Association, it is a matter of deep regret to the Committee that all the members do not make this report, as the Committee would then have complete data upon which to base its conclusions. As it now stands, the 23 members who exchange this report are advised of the prices obtained by each other, but they have no knowledge of the prices obtained by the six members who do not report, while each of the six members is traveling alone, and in the dark as to the prices obtained by the other 28 members of the Association. These conditions can not but have a depressing effect upon values, as all the members are not in the position to refute statements made by buyers regarding low prices, which they would be in if they knew from the reports of the member himself the prices he is getting for his Flooring. *All the steps taken during the past two years in the work of*

the Association, tending to greater publicity and a freer and franker exchange of information among the members themselves, have been of benefit to them, and in times of slackened demand and stories and rumors of low prices team-work among those who are vitally interested in maintaining stable conditions in their own industry has the greatest value to them. (Vol. III, p. 203.)

Market Conditions Committee Report, January 28, 1914

The improved method of reporting current net values should also be noted. The old plan was to report the sales during the month which were shipped during the same month. Now all of the sales of the specified items during the month are reported, regardless of when shipment is made. This covers a larger range of transactions and more clearly indicates the trend of prices from month to month. (Vol. III, pp. 207-8.)

Market Conditions Committee Report, February 13, 1914

It has been hoped that the few members who do not make the Current Net Values report would conclude to do so in order that every member may have the benefit of knowing what every other member is getting for his Flooring, as there is no question but that some of the members, who do not make this report, are led to believe that other members are selling for less than they are actually getting, and the same condition applies to the members who do report, respecting the prices the members who do not report are

said to be selling at. This, as you will readily see, can cause much demoralization in values, because if a buyer tells you that so-and-so is selling his Flooring at such a price, you are not in a position to refute his statement because you are not fortified with the information from the member himself of what he is getting for his Flooring. Whether or not all the members report, it would seem that the interests of the Association can be best served by sending to every member the individual reports of Current Net Values, so I trust the members who are making these reports will waive the reciprocal conditions under which their reports are made and permit the information to be sent hereafter to the entire membership with the other regular monthly reports. (Vol. III, pp. 331-332.)

Market Conditions Committee Report, March 25, 1914

In view of this data, the present selling values of flooring may be considered \$3.50 off on Clear, \$2.00 off on No. 1, and \$3.50 off on Factory from the Recommended List of May 21, 1913, and while these values are lower than our statistics, the demand for our goods and the market price of the raw material warrant, *the Committee is convinced that without the exchange from month to month of the information in the individual reports of Current Net Values prices would have gone much lower because of the dull season of the year and the general uncertainty and apprehension regarding the business outlook for 1914.* (Vol. III, p. 205.)

Market Conditions Committee Report, September 24, 1914

In view of the complicated situation it would indeed seem prudent to go slow and be guided by a careful study of our statistics from month to month, pursue a policy of "watchful waiting" in respect to production, and safeguard ourselves all we can by a liberal exchange among ourselves of all available information regarding trade conditions as they develop. (Vol. III, pp. 219-20.)

Tenth Annual Report of the Secretary, January 29, 1915

You have already received the annual statistics, and while they will be reviewed in detail in the report of the Market Conditions Committee, I would like to submit a contrast of stock conditions and current net values during the past three years. It proves beyond a doubt that cooperation can be made helpful in bad times as well as in good times. (Vol. III, p. 116.)

Market Conditions Committee Report, February 25, 1915

Because of the critical situation we are now in it is of the utmost importance that our statistical reports be in the hands of the membership very early in the month in order that the information in the reports may be of greater value to the association.

* * * * *

May we not depend upon your cooperation in this respect, because after all it takes no more time to make out your reports on the 2d or 3d of the month than it does to make

them out two or three weeks later, and at this particular time of all times there is nothing more important to us all than to have accurate information as quickly as possible regarding conditions which have such a direct bearing upon our own welfare. (Vol. III, p. 233.)

Minutes of Association Meeting, July 16, 1915

The members who make the monthly reports of Current Net Values are in a position to analyze in detail the net prices obtained by other members and by each geographical group. If you are not making this report you are missing information that has proven to be of great value in handling sales. (Vol. III, p. 124.)

The great value both of the weekly sales reports and of the statistical reports, and the importance of their analysis by the members before attending the association meetings were emphasized in the Report of the Market Conditions Committee dated October 28, 1921, part of which reads as follows:

Weekly Sales Reports.—The importance of making the Weekly Sales Reports regularly and promptly was discussed and the great value of the information contained in the reports regarding the current state of the market was conceded, and three of the members of the Committee who are not making these reports promised to do so. All the other members of the Association who are not making these reports are earnestly urged

to do so, in order that every member of the Association may keep in close touch with conditions instead of working in the dark.

* * * * *

More Cooperation.—We wish to make the following recommendations in order that there may be more cooperation in the work of the Association:

1. That Dr. Earle, as President of the Association, is requested to call a general meeting of the Association to be held as early in November as possible.

2. *That all the members of the Association make their Weekly Sales Reports regularly and promptly.*

3. *That all the members send in during the first week in November their statistical reports for the month of October so that a conference can be held on November 16th or 17th.*

4. That if the Secretary receives by November 7th all the October reports from all the members, that his report be made out and mailed to the members on November 10th or 11th, *so they will receive the October statistics in advance of the meeting and have an opportunity to analyze them and can come to the meeting fully informed respecting trade conditions as reflected by the statistical reports.* (Vol. III, pp. 254-255.)

A letter from Mr. Keehn, dated December 3, 1921, to the three members who were not then contributing to the weekly sales reports, again emphasized the value of the information contained in them, and especially of the information as to the

current movement of flooring—a feature of the reports to which great importance was attached by several of the witnesses examined. This letter reads as follows (Vol. IV, pp. 535–536):

GENTLEMEN: One of the members of your Market Conditions Committee, writing about our latest weekly Record of Completed Transactions, states that it is very gratifying to note the number of members who are now reporting regularly. They feel confident that the members who do not report, evidently having discontinued their reports because other members had neglected to report, now fail to realize the importance of the valuable information contained in our weekly reports and that all but three of the members are reporting.

We believe our Weekly Sales Reports to the members have a number of very good features. Aside from their indication of the current trend of the market, the demand for each grade, face and thickness in each wood, the total volume alone of weekly bookings in each group, and the total of all groups, is enlightening.

You probably had an unusually large volume of flooring orders for the week ended November 16th, and assumed that the experiences of the other members were similar, but could any member have known (or estimated) without the existence of our Weekly Sales Reports that the total New Business Booked of 19 members for the week ended November 19th was very close to five

millions? Without these reports they could have knowledge only of an increased demand for Maple, Beech, and Birch Flooring, but the real extent of this demand as affecting the different grades and sizes of our flooring in combined volume would not be known until weeks later, upon the compilation of our November statistical reports.

It has occurred to us that you may feel that you can not afford to be without this exchange of information when you learn that all but three of our members have indicated they want this information by taking a minute or two of their time to daily record all sales on the blank forms provided and mailing them to us at the close of each week. And we and the reporting members would like to have our weekly reports show our members' sales 100% reported. We can do this if you, and the other two missing members we are writing to-day, will kindly send us the report of sales for week ended to-day. May we count on your cooperation?

IX

Association Meetings

Article IX of the Articles of Association under which the defendants were operating when the petition was filed provides that an annual meeting for the election of officers and trustees and the transaction of other business shall be held on the third Wednesday of January of each year; that regular meetings for the transaction of business shall be held on the third Wednesday of April,

July, and October of each year; and that special meetings may be called by the President or a majority of the Board of Trustees on not less than five days' notice. (Vol. III, p. 67.) Each of the Articles of Association under which the defendants operated from 1916 to 1922 contained a similar provision (Vol. III, p. 17, p. 28, and p. 40), but the Articles in effect from January 1, 1913, to December 31, 1915, provided that there should be five regular meetings in addition to the annual meeting (Vol. III, p. 4).

Mr. Keehn testified that he never kept a minute book, but that he made rough notes and wrote them up and mimeographed them, and sent the reports to the members as memoranda of the proceedings of meetings. He also testified that he did not have any of the minutes of the meetings during the period when the Articles of Association dated January 1, 1913, or any of the succeeding articles were in effect, other than those he had given to the Department of Justice. (Vol. I, p. 79.) All those minutes or memoranda, and all other minutes, reports of the Market Conditions Committee, and reports and circular letters to members from the secretary, which the Government secured under subpoena duces tecum to each member of the association, were introduced in evidence and appear in various portions of the record. With reference to the Market Conditions Committee, Mr. Keehn stated:

These associations at one time had a committee called "Market Conditions Commit-

tee," with, I think, about 7 or 8 or 9 members. The functions or rather the duties of that committee were in a general way to find out the state of the market, the trade conditions, and to make an analysis of conditions generally and report to the association as to their findings. *They sometimes made their reports to the association in the meetings*, sometimes by mail to the association. I sent out the reports of that committee to the members of the association, and when the reports were made verbally at association meetings I might reduce them to writing or they might be referred to in the minutes of the meetings. Anyway, I circulated them among the members of the association.

I couldn't say positively from what sources this committee got its information. I suppose from all sources. The committee ascertained from past transactions what the prices were at which maple flooring was being sold. (Vol. I, p. 95.)

The last report of the Market Conditions Committee which was introduced in evidence is dated October 28, 1921, and according to Mr. Keehn that committee was not succeeded by another committee; but a new committee was created called the "Cost Surveys Committee," which has been operating since in accordance with the articles of association of January 1, 1922. (Vol. I, p. 96.)

With reference to the number of meetings held, **Mr. Keehn testified:**

Q. Now Mr. Keehn, going on to another matter, you held meetings?

A. Yes.

Q. How often were those meetings held?

A. *During the past year I think they were held about monthly, there may have been months they were not held. In former years they were held quarterly and semiannually and annually.*

Q. When did you begin holding those meetings monthly?

A. I would say from memory some time late in 1921 or during the year 1922.

Q. * * * *Anyway, those meetings began to be held monthly after the decision in the Hardwood Lumber Company case.*

A. *Not in every case monthly, but I would say in a general way monthly.*

Q. Before that they had been held quarterly?

A. There were sometimes special meetings, and semiannual meetings and annual meetings.

The Court: Haven't you the records here that show the proceedings of these meetings?

A. We have many of them, but not any of the old ones.

Q. Did you keep minutes of all the meetings?

A. *We kept minutes of all meetings but didn't keep all minutes of all meetings.*

Q. What did you do with the minutes that you haven't got?

A. That we have got or haven't got?

Q. Haven't got?

A. They go back for a long period of time, and we don't keep all those things.

Q. Have you got all minutes for the last two years?

A. I think probably we have. (Vol. I, pp. 132-133.)

The first meeting in 1922 was held January 12th. Other meetings were held during that year on February 25th, March 9th, March 29th, April 20th, May 17th, June 21st, July 19th, August 16th, October 24th, November 15th, and December 19th.

We held meetings subsequent to that and are holding them now. (Vol. I, p. 134.)

And with reference to the proceedings and discussions at meetings of the association, Mr. Keehn testified:

We had no stenographer present at the meetings and didn't undertake to take down just what was said and done.

Q. You just made a memorandum of some things?

A. Made a memorandum of all things that were talked about in these meetings and wrote them up afterwards.

Q. Do you mean to swear that your minutes of those meetings show everything that was talked about?

A. By the Association as an Association meeting, with the exception of the details of the defense of this suit. That was not written out.

Q. Well, I believe you swore the other day that you didn't have, or didn't record the action of the meeting with reference to a discontinuing of that allotment?

A. No; we didn't record that. That was in 1920.

Q. In those meetings what did you discuss?

A. *Well, discussed trade conditions generally as reflected by statistical information; they discussed the market prices of rough maple flooring or lumber; they discussed manufacturing and market conditions; they sometimes discussed labor conditions; they would devote a large amount of time to discussing the advertising campaign which the Association has had under way during the last year and a half or two years; spent considerable time on Grade Committee work, also on the petition presented to President Harding when he was alive about doing something on the duty on Canadian flooring; all those things were fully outlined in the minutes of the meeting.*

Q. Did you ever discuss the price of maple flooring?

A. We do not discuss the price of maple flooring at the present time.

Q. Never mention it?

A. We do not discuss the future prices to be charged. There is no reason to discuss past prices because they are contained in the weekly sales report which the members have before they come to the meetings.

Q. You never mention the prices of flooring at all?

A. Not as an association discussion.

Q. What about the individuals that stand around?

A. I don't know what they talk about. They may talk about a hundred different things. I am speaking about the association discussions—what the association discusses.

Q. That is when they assemble around there and do not get up publicly to make speeches to each other?

A. They do not talk about the price of flooring they are going to charge.

They met every month and discussed the particular matters outlined in our minutes of the meetings. They were written up in the minutes of the meetings. They usually meet at the Congress Hotel. Sometimes about 11 o'clock, and staying in session until about 12.30 or 1 o'clock, then have lunch and get together again about half past 1 or 2 o'clock, and many of them go to the ball game, and that is the end of the meeting. It usually breaks up about three o'clock. (Vol. I, pp. 134-135.)

On cross-examination Mr. Keehn testified further with reference to the same matter:

We have never discussed the prices to be charged or asked for maple flooring. We of course have the weekly reports of sales and monthly report, and which are past transactions, and sometimes as those reports were distributed at the meeting they looked them over. (Vol. I, p. 174.)

Mr. William L. Saunders stated on direct examination that at the association meetings in Chicago he met his maple-flooring friends with less trouble than would otherwise have been the case, that he was frequently able to dispose of rough maple lumber at the meetings to manufacturers who do not own their own stumpage; and that at the meetings they also discussed wages or manufacturing troubles, also car service, traffic difficulties, and the merits of the different flooring machines, etc. He also stated that standardization of flooring had been perfected only step by step during the past fifteen years and is one of the features of association work, and that at the meetings which he had attended there had never been any discussions with respect to the *future* prices of flooring.

On recross-examination Mr. Saunders testified as follows:

Q. Since he went into these meeting matters, I will ask a question or two. You tried to prove the things you did not discuss when you get together. Do you ever say anything about the market for lumber?

A. Of our rough lumber?

Q. No; Maple Flooring; when you meet these gentlemen who are concerned in manufacturing Maple flooring, do you ever speak about market conditions?

A. As to the question of supply and demand—things of that kind, do you mean?

Q. Yes. Do you talk about that?

A. *Individually, not collectively, not as an Association.*

Q. *You mean as you are standing about together, or lunching together, you talk that all over?*

A. *Yes, sir.*

Q. Do you talk about the prices that you have been getting for your lumber?

Mr. DARBY. Do you mean flooring or lumber?

Mr. FOWLER. When I say lumber I mean flooring.

A. Personally, I have no knowledge of prices ever being talked.

Q. You talk about everything else but prices?

A. That is the least of our troubles.

Q. If you don't get a good price, you will soon go to the wall?

A. Yes, sir.

Q. That is what you are specially interested in?

A. Yes, sir. (Vol. I, p. 206.)

Q. So you mean to say that you gentlemen will talk about everything else connected with the Maple flooring industry but you won't hint prices?

A. I think that subject is the least discussed of any.

Q. Then it is discussed, is it? You say it is the least discussed?

A. Oh, it would be impossible not to mention it sometimes in your conversation. I might confess that my price was so-and-so,

and the other fellow might say his was so-and-so.

Q. Since you have been reporting your prices from week to week, every single sale to the Association, why are you so awfully particular not to talk about it between each other?

A. The individual member does not know what my prices are as I report them to the Association.

Q. He did up to July last, didn't he?

A. Yes.

Q. Before last July—if your mouth has been shut so tight since—before last July when you were reporting your prices to the Secretary and he was sending it right out to every member of the Association, why were you so awfully particular not to talk about it?

A. I took the chance of his remembering as to what my quotations were previously and it wasn't necessary for me to mention it.

Q. *Would you ever talk about what the prices would likely be in the future, whether prices were going up or down, market conditions were favorable or unfavorable, ever talk about that?*

A. *I might have expressed my opinion about that.*

Q. *Didn't you time and again talk that one thing?*

A. *You mean now as an individual talking to an individual?*

Q. *Individuals talking around there, either on the floor of the Association or at your luncheons, or anywhere?*

A. *Or in the lobby of the hotel?*

Q. *Lobby of the hotel or anywhere?*

A. *We might discuss those things.*

Q. *Well, didn't you, as a matter of fact?*

A. *I think, as a matter of fact, we would to certain extent.* (Vol. I, p. 207.)

Mr. Frank M. Hodges stated on his direct examination that there could not have been more than two or three meetings after he joined the association in August, 1921, and he did not remember whether he attended all of them, and that he attended perhaps two-thirds of the meetings during 1922. (Vol. I, pp. 295-296.) He then testified:

The COURT. Now, during 1922, at these meetings which you attended, was there any discussion of market conditions, trend of the market, prices realized?

A. I don't recall any such discussions in the meetings. We had reports of costs committees, of course, on rough lumber and manufacturing costs and things of that sort.

The COURT. You certainly discussed those, did you not?

A. Yes, sir.

The COURT. Can you tell me why? Was not the natural discussion of market conditions, the market trend, the outlook?

A. Yes.

The COURT. Will you tell me why there wasn't any discussion of it?

A. Well, I think that after the decision of the Supreme Court about those things that

our attorneys advised us that those things were not to be discussed; I don't recall.

Q. But you did discuss the past transactions, did you not?

A. Oh, yes.

Q. And the cost of rough lumber and manufacturing costs and the advertising campaign was discussed?

A. Yes, sir.

Q. And traffic questions would come up, but those of past transactions, I understand, you discussed.

A. What do you mean?

Q. These reports which would show what—the monthly reports of the secretary.

A. Oh, yes.

Q. But there was no understanding or agreement with respect to future prices.

A. No, sir.

The COURT. What benefit did you derive from discussing past transactions?

A. Well, we were enabled to find out how much stock of certain grades had been shipped and what had been obtained for it, that was valuable information.

The COURT. What was the benefit of that?

A. It shows what stock was being moved at the time.

The COURT. Well, it enabled you to forecast what was going to happen in the future?

A. To a certain extent.

The COURT. And that was the only benefit?

A. To a certain extent; yes, sir. (Vol. I, pp. 296-297.)

On cross-examination Mr. Hodges testified as follows:

Q. How far is Tupper Lake from Chicago?

A. Oh, it is probably 900 miles, something like that.

Q. How long would you be in session there at Chicago?

A. One day, usually.

Q. *When you had those meetings you had these weekly sales reports before you, didn't you?*

A. Yes, sir.

Q. *They were distributed around among you, weren't they?*

A. Yes, sir.

Q. *So that you would have them right before your eyes while you were going on with your discussions?*

A. Sometimes they were.

Q. Anyway, after you got there, he distributed them among you?

A. Possibly the last week's statistics, if they had not been mailed he would distribute them at the meeting.

Q. Distribute them monthly. These stock reports and shipments and things of that kind, you had them before you, too, didn't you?

A. Yes, sir.

Q. So you had the whole situation there right before your eyes, every member during those discussions, did you?

A. We did not discuss them at the meetings.

Q. What did you have them before your eyes for? What were they distributed among you for, and why did you have them in the meeting if you did not discuss them?

A. Well, we could look them over; they were distributed to us there rather than to be mailed to us at our home.

Q. Well, what did you talk about, then, that was in those reports, if you didn't talk about prices?

A. About stock conditions, manufacturing costs, things of that sort.

Q. Now, you mean to say, do you, that when it came to a question of price on past transactions that your mouths were simply shut; is that right?

A. I wouldn't say that entirely. (Vol. I, pp. 297-299.)

Mr. Ralston was one of the frankest witnesses examined with reference to the matters discussed at the association meetings.

On cross-examination he stated that he was a member of the Market Conditions Committee for about a year or a year and a half; that the committee simply gathered information as to the costs of manufacture, test runs, the average of the test runs, and general information on the markets and on conditions for the benefit of the members of the association; that there was no report made of any kind to amount to anything, but generally the committee just talked in the general meeting of what they had found, and that the report was discussed

in the open meeting. (Vol. I. p. 330.) He then testified as follows:

Q. As a matter of fact, that is one of the principal things that was discussed in those meetings, was it not—the general market conditions?

A. *The general market conditions were always discussed; yes.*

Q. *And the range of prices?*

A. *Sometimes.*

Q. *Wasn't that one of the things that was generally discussed—range of prices?*

A. *Not always; no.*

Q. *Didn't you consider where the prices were, going down or going up, or had been going down or going up?*

A. *There was probably some talk of that, more or less; yes.*

Q. *That was the interesting thing, wasn't it, whether prices were going down or up?*

A. *Absolutely it is to any manufacturer, it might be.*

Q. When you were talking about general market conditions, it was with reference to whether it would justify prices going up or whether it would necessitate their going down?

A. Not necessarily, it was merely the talk from that Committee was merely on general conditions and on the general state of the market.

Q. Wasn't the ultimate thing you had in mind whether or not the price should be advanced or whether you would have to lower the price?

A. That may be true, I couldn't say what was in their minds.

Q. Really, wasn't that true that that is what you were driving at all the time?

A. *There is no question at all if I went to one of those meetings, I went there to get information if I could as to market conditions, and the reason I wanted that information was to know what I would do with my prices; yes.*

Q. *That was the ultimate object you had in mind all the time?*

A. *Absolutely.*

Q. *That is what you wanted all of this information for?*

A. *Why, it would be useless to us for any other purposes.*

Q. *And that is the reason all of you exchanged all this information about yourselves, was it?*

A. *Yes, it was spoken of that way. (Vol. I, pp. 330-331.)*

On recross-examination Mr. Ralston testified as follows:

Q. *You discussed past prices?*

A. *Past prices, yes; and general market conditions.*

Q. *Did you stop right at the minute you were talking or did you stop an hour or two beforehand?*

A. *I really couldn't say where the stop was. The talk as a rule was all general.*

Q. *Just discussed the prices until you got up to the present and then you quit; is that it?*

A. I didn't say that; I just simply said I really couldn't say. (Vol. I, pp. 332-333.)

An interesting commentary on the value of attending the Association meetings is contained in a letter dated January 31, 1923, from the North Branch Flooring Company to the Flanner Steger Land & Lumber Company, and in the answer of the latter company dated February 5, 1923. Part of the first letter reads as follows:

The writer was very glad to see Mr. Flanner at the meeting last week and wishes to take this opportunity to encourage your regular representation at these meetings. *We can say from actual experience that the personal contact and association with the other members has become very valuable to us and we have been able to capitalize this to a remarkable degree.* (Vol. IV, p. 479.)

And the answer stated:

We are quite in accord with what you have to say regarding the value of attending the Flooring Association meetings. It is the expectation of Mr. Frank Flanner and myself that some one from this company will be at these meetings. (Vol. IV, p. 480.)

The appellants' brief states that "inasmuch as the expenses of members to and from the monthly meetings were paid by the association, it is not surprising that a majority of the members usually attended these meetings" (p. 232). But although that fact may explain why the member from Tupper Lake is able to make the 900-mile trip to Chi-

icago every month, it does not explain why the member in Chicago is willing to contribute, through the association expense fund, a portion of the expenses of that trip. The latter fact certainly constitutes unparalleled generosity on the part of the member in Chicago, if, as intimated in the appellant's brief, the primary object in attending the association meetings is to secure the instruction or diversion offered by a great city or to make sales to customers in Chicago.

Great emphasis is placed by counsel for the appellants on the alleged reformation in the practices of the association in accordance with an opinion given by Mr. Newman after the decision by the Supreme Court in the Hardwood case. As stated heretofore, however, no change was made in the reporting system of the association on account of that decision, and the only material modification made in the form of the association's activities appears to have consisted of the discontinuance of the Market Conditions Committee and of the monthly reports made by that committee analyzing and commenting on the association statistics, in accordance with the advice that the association "must see to it that no one classifies, analyzes, interprets, comments upon, or makes any recommendations concerning the same, or makes any prophecies as to the future prices, output, or other matters." (Vol. III, p. 152.)

During the period from 1913 through 1921 the members of the association regularly received

written analyses of conditions by the Market Conditions Committee along with their statistical reports, and it was not necessary for them to hold more than four or five meetings a year to transact the business of the Association. But, when the distribution of the committee's comments was stopped on advice of counsel, monthly meetings were begun so that the same information and advice could be obtained by word of mouth.

The character of the reports and observations which the members had regularly received from the association for many years, and of the value of those reports as a basis for estimating future conditions, is covered very adequately and fully in the Semiannual Report of the Market Conditions Committee dated July 20, 1917; which is as follows (Vol. IV, pp. 438-440):

To members:

GENTLEMEN: The statistical reports prepared by Mr. Keehn for the first half of the year give all the available data of that character. Whether such reports are regarded as merely a comprehensive review and record of a past period or whether they have an additional value as a guide for the future, depends largely upon the method of their analysis and interpretation. When the significance of each of the various factors of the statistical data is determined and the influence of other factors, such as outside competition, building activity, and manufacturing costs, buying seasons and the character of the demand, is properly estimated, we have

acquired the Eyes of Business, can see ahead with greater clearness, and can plan for the future with greater confidence of success.

As an aid in the analysis of statistics a barometer has appeared in our monthly reports during the past year to show a graphic comparison of conditions with the corresponding month of the previous year. The barometer gives a birdseye view of conditions but does not estimate the comparative value of its various factors. However, before discussing this feature, an explanation of the construction of the barometer, how and why it is thus made, may be informative and increase its value.

During January and February we had 25 members, during March 24, and during April, May, and June 23. The barometer is adjusted to these changing conditions in the following manner:

The first shaft is the Measure, and you may have noted that it is always the same height. It is an arbitrary yardstick.

The relative heights of the other shafts are determined by the percentage of increase or decrease of the various factors based on the reports of the same members for corresponding periods. Consequently the June 1916, business of the two members who have dropped out since the first of this year was not considered in making the barometer for June, 1917.

The barometer each month reflects a comparison under like statistical conditions with the same month of the previous year.

Returning now to the comparative values of the various factors of the barometer:

The factors are:

- Stock on Hand.
- Unfilled Orders.
- Shipments.
- Production.
- New Business.
- Average Values.

Inasmuch as the value of any factor may change with the changes in surrounding conditions, it is impossible to formulate any arbitrary or fixed rules for determining market conditions. The monthly combination of factors is kaleidoscopic—never twice the same. Consequently the significance of the various factors of the barometer must be estimated by judgment based on experience.

This may be illustrated by the barometer for June. Based on the half year, it shows slightly less than the average "Stocks on Hand," the lowest "Production," and the highest "Average Values" of the period. These are important factors and if considered by themselves would seem to foreshadow good results for July. But the other statistical factors show that relatively "Unfilled Orders" fell 26 points in June and that "New Business" and "Shipments" are the lowest in six months. This gives us comparative results based on corresponding periods last year.

To show the trend of current conditions, a comparison of May and June this year indicates that during June:

Stocks on Hand decreased 1 Point.
Unfilled Orders decreased 11 Points.
Shipments decreased 15 Points.
Production increased 4 Points.
New Business decreased 36 Points.
Average Values increased 3 Points.

The reduced volume of New Business in June may be due to earlier booking in anticipation of advancing prices, but the falling off in Shipments should be seriously considered. And it should also be noted that the first of this month records the smallest volume of Unfilled Orders shown this year.

It is obvious that right here the non-statistical factors demand attention. These are:

1. Building Activity.
2. Character of Demand.
3. Manufacturing Costs.
4. Outside Competition.
5. Buying Seasons.

We know (1) that there is a material decrease in building activity that requires hardwood flooring; (2) that the demand for Clear is relatively less than for No. 1 and Factory; (3) that the manufacturing cost of flooring was never before so high as it is now and that costs are increasing; (4) that outside competition is active and aggressive; and (5) that July is normally a quiet month for new business and is more likely to be so under present conditions.

The foregoing brief analysis of conditions the first of this month affords a basis for the conclusion that the volume of Shipments

and New Business for July will be less than normal, but that the special demand for No. 1 and Factory may support some advance in prices of those grades. It is also evident that at present the demand can not be increased by price concessions. Also that prices are not likely to be reduced on account of high manufacturing costs and easy warehouse conditions. The present manufacturing plan should be to reduce the output of Clear flooring and increase the output of No. 1 and Factory.

This is not a Semiannual Report in conventional form. It is rather a report and explanation of methods, and your committee has taken the liberty of offering it with the hope that it may suggest ways of analyzing our statistical reports from month to month so that they may be more valuable to you as a basis for estimating future conditions.

Respectfully submitted.

MORRIS E. THOMAS, *Chairman*,
E. HARVEY WILCE,
B. P. WHEDON,
WILLIAM E. COX,
GEORGE STRABLE,
C. H. LAW,
J. D. STAPLE,

Of Market Conditions Committee.

The monthly reports which the association now prepares and places in the hands of the members either before or at the monthly meetings, show the analysis of the statistical factors at a glance, so that

their interpretation by a committee of experts is not required; and the evidence clearly establishes that all the "non-statistical factors" referred to in the committee report quoted above, are freely and habitually discussed at the association meetings, that the members now have the weekly sales reports, and that they are therefore now—even if future prices are not discussed at association meetings—in a more advantageous position than ever before to reach a common analysis of conditions and consensus of opinion as to prices and production.

The defendants, who testified, and counsel for appellants in their brief, emphasize the necessity for the frequent meetings to discuss questions relating to grades and grading rules, to standardization, to manufacturing difficulties, to advertising, to traffic questions, to the tariff on flooring, to freight rates, and to labor troubles, *but such questions must have arisen as frequently if not more frequently prior to 1922 than after that date, as no changes in the association grades or grading rules or in the standard sizes have been made since the present articles of association went into effect.*

The following table shows what subjects were actually discussed at the association meetings during 1922 after the reorganization of the association was completed and the new Articles of Association were adopted. *The first twelve subjects are those suggested by the defendants as those requiring frequent discussion, and the last seven subjects are*

those which the government contends suggest the correct answer to the question why the practice of holding monthly meetings was instituted after the decision by the Supreme Court in the Hardwood Case and the consequent discontinuance of the written reports analyzing and interpreting the statistics.

1. Standardization.....							
2. Grades.....	Apr. 20		June 21	July 19		Oct. 24	
3. Manufacturing difficulties.....							
4. Marketing problems.....							
5. Advertising.....	Apr. 20			July 19	Aug. 16	Oct. 24	Nov. 15
6. Traffic questions.....							Nov. 15
7. Tariff on flooring.....					Aug. 16	Oct. 24	Nov. 15
8. Freight rates (Rate Books).....							Dec. 19
9. Labor Troubles.....							Dec. 19
10. Manufacturing Costs.....							
11. Wages.....							
12. Merits of Flooring Machines.....							
13. Average Cost of manufacturing and marketing and reports on cost.....							
14. Euveys of Cost and Test Runs.....	May 17		June 21	July 19	Aug. 16	Oct. 24	Dec. 19
15. Spedal statisticl comparison.....							Dec. 19
16. Trade conditions and relations of supply and demand as reflected by Statistical Reports.....				July 19	Aug. 16	Oct. 24	Dec. 19
17. Rough Lumber—Supply and Market Value.....	May 17	June 21	June 21	July 19	Aug. 16	Oct. 24	Nov. 15
18. Flooring Data.....	Apr. 20	June 21	June 21	July 19	Aug. 16	Oct. 24	Dec. 19
19. Stock on hand.....	Apr. 20	May 17	June 21	July 19	Aug. 16	Oct. 24	Dec. 19

¹ Not mentioned in memorandum of meeting, but given in call for meeting as one of the subjects for discussion.

² Representatives of Department of Justice present at meeting.

NOTE.—The minutes of the Association meetings from which the data showing the subjects discussed was taken appear in the record as follows: April 20, 1920, Vol. III, p. 164; May 17, 1922, Vol. III, p. 171; June 21, 1922, Vol. III, p. 173; July 19, 1922, Vol. III, p. 176; August 16, 1922, Vol. III, p. 181; October 24, 1922, Vol. III, p. 185; November 15, 1922, Vol. III, p. 191; and December 19, 1922, Vol. III, p. 197.

That flooring data, stock conditions, and average costs computed in accordance with Article XIV of the Articles of Association were subjects of primary importance for discussion at the Association meetings held in 1922 is further shown by a consideration of the letters sent out by Mr. Keehn to remind the members of each meeting.¹

The letter dated May 10, 1922, with reference to the meeting to be held May 17, 1922, reads in part as follows:

Among the subjects to be discussed at the meeting are the following:

* * * * *

3. The Committee on Cost Surveys will meet on the afternoon of the 16th and will make a comprehensive analysis of the Average Cost of Manufacturing and Marketing Maple Flooring as ascertained according to Article XIV of the Articles of Association, and will make a report to the general meeting.

If you have recently purchased any rough Maple Lumber on the open market or if you have any information regarding any purchases or sales of same, will you please send the information on the 15th to the Secretary, giving the prices F. O. B. sawmill (omitting the location of the sawmill), and the cost of

¹ Letters to members giving the dates of meetings and the subjects for discussion were sent out under the following dates, and are printed in the record as indicated: Vol. III, May 10, 1922, p. 170; June 15, p. 172; July 13, p. 175; Aug. 16, p. 181; Sept. 21, p. 184; Oct. 24, p. 185; Nov. 10, p. 190; Dec. 14, p. 196.

freight from the sawmill to your flooring plant? This information will be very useful to the committee in its work and it will be held strictly confidential and no information will be given revealing the identity of the buyer or seller, or the source of the information, if you so desire.

There has been a good volume of New Orders Booked since the last meeting, and it will be very interesting to know how business has been running during the first half of May. It looks as if the 13/16" x 2 1/4" face No. 1 Maple flooring will be oversold to a greater extent than on April 18th, the date of our last compilation.

Please remember to bring with you to the meeting the flooring data as per blank form below, so the data can be summarized and the members fully informed as to actual stock conditions, etc., on May 15th.

Flooring Data, May 1-15, Incl.

Shipments..... M
New Orders..... "
Production..... "

Stock conditions of 1 1/8 x 2 1/4" face maple flooring

On May 15	Clear	No. 1	Factory	Total
Stock on Hand.....	M	M	M	M
Unfilled Orders.....	"	"	"	"
Unsold.....	"	"	"	"
Oversold.....	"	"	"	"

(Vol. III, p. 170.)

Each notification of a meeting to be held requested the members to send or bring flooring data as per the blank form copied above, and the letters

dated July 13, 1922, and Aug. 10, 1922, emphasized the importance of this information as follows:

It is important to know how the flooring business is running so far this month, and we wish to suggest that if the members will supply the data as outlined on the blank form below, covering the first half of July, and mail the data to us at the close of business July 15th or on Monday the 17th at the latest, that we will compile same and have it ready as soon as the meeting is called to order. This will save time and give you a better opportunity to consider the relations of supply and demand as reflected by the data than if the matter is delayed by our not getting these reports until the members arrive in Chicago and then not getting them compiled until late in the afternoon. (Vol. III, July 13, p. 175.)

Please be sure and bring with you to the meeting the flooring data as per blank form below *so that you will have as complete information as possible regarding statistical conditions on the day of the meeting.* (Vol. III, Aug. 10, p. 181.)

That the flooring data requested in each notification of a meeting is especially important in enabling the members to forecast future conditions, and that the discussion of the statistical and trade conditions at least was not confined to the past, is indicated by the letter dated February 19, 1923, which Mr. Keehn sent to the members and which reads as follows (Vol. IV, p. 470):

FEBRUARY BUSINESS

To members:

GENTLEMEN: We have received flooring data from 14 members of the Association covering the first 13 days of February, from which it is estimated that if the business during the remainder of February averages about the same as the first 13 days and if the trade experiences of the other 8 members are about the same, that the February business will turn out about as follows:

Shipments about 26% less than in January.

Production about 21% less than in January.

New orders about 41% less than in January.

The stock conditions of 13/16 x 2¼" face Maple flooring on February 13th of the same 14 members indicate as follows:

On Feb. 13—	Stocks on hand	Unfilled orders	Over-sold	% sold 14 members	% sold Feb. 1, all members
Clear.....	2, 158 M	8, 502 M	6, 344 M	394%	411%
No. 1.....	1, 424	6, 812	5, 388	479	407
Fety.....	1, 009	3, 118	2, 919	364	399
	4, 681	18, 432	14, 751	394	405

A note as to a discussion of the subject "Trade conditions and the relations of supply and demand as reflected by our (the association's) statistical reports" is found in only two of the memoranda of meetings analyzed in the above table (p. 163). It is, however, reasonable to assume from the statement

in the letter dated December 14, 1922 (Vol. III, p. 196), to the effect that the November reports would be ready for the meeting so the members could know how the November business turned out, that those reports were discussed at the December meeting, to assume from the paragraph quoted above from the letter dated July 13, 1922 (p. 166), that the relations of supply and demand were discussed at the July meeting, and to assume from the following paragraphs in the letter dated October 24, 1922, not only that the subject of trade conditions and the relations of supply and demand was discussed at the October meeting, but also that it has been the principal subject for discussion at every meeting:

It has now been two months since there has been a "gathering of the clan," and it is hoped that every member of the Association will be represented at the meeting so that trade conditions and the relations of supply and demand for flooring can be discussed and considered.

We expect to have our statistical reports for the month of September made out and in the mail for you on the 19th or 20th, so that you will have an opportunity to look them over in advance of the meeting and see how the September business turned out. (Vol. III, p. 185.)

None of the memoranda of association meetings held since January 1, 1922, indicates that any dis-

cussion was held with reference to prices, past, present, or future, but the record contains letters to members dated June 15, 1922, and July 13, 1922, in which Mr. Keehn specially requested the members to send in their weekly sales reports so that he could make up the association report and have it ready for the general meeting. (Vol. IV, pp. 461 and 462.) The remark appended to the request of July 13, "hoping you will be able to do this so that you will have information up to date regarding the market," certainly indicates that the sales reports were intended to be used as the basis for a discussion at the meeting of past and up to the minute prices; and substantiates Mr. Ralston's testimony that past prices and general market conditions were discussed at the association meetings even after the 1922 reorganization.

The evidence considered heretofore with reference to the procedure and discussion at the association meetings establishes that, as in the case of the changes made in the sales and statistical reports shortly before the hearing in the court below, the change made in the activities of the association after the decision by the Supreme Court in the Hardwood Case related entirely to the form of the activities, and not at all to their substance and effect. The Market Conditions Committee was discharged, and the association resolved itself into a Committee of the Whole for the monthly discussion and analysis of the same matters

which had formerly been discussed and analyzed in the monthly reports of the Market Conditions Committee. In fact, the practice of having the Market Conditions Committee analyze, interpret, and comment on the statistics was discontinued even before that committee was discontinued, because the members recognized the superior advantages of their present system of discussions at association meetings. This is shown by the following paragraph from the minutes of the general meeting held August 19, 1921:

Market Conditions Committee. — Mr. Thomas, Chairman of the Market Conditions Committee, stated that his Committee had nothing special to report as a Committee, no meeting having been held prior to the convening of the general meeting, as the members of the Committee felt that trade conditions and our July statistics could be discussed to just as good, if not better, advantage by the Association as a whole as to hold a separate meeting of the Committee. (Vol. III, p. 137.)

X

Results of the Association's Activities

The brief for appellants states (p. 161) that the Government has abandoned its contention that there has ever been uniformity of prices. The record clearly shows what the Government's contention was in the court below, and it maintains the same contention here; which is, that competi-

tion between defendants in the manufacture and sale of maple, beech, and birch flooring has been greatly suppressed, and that the prices of such flooring have been very materially increased in consequence of the practices pursued by this combination between defendants known as the "Maple Flooring Manufacturers' Association." As has been pointed out by the Government in previous cases, the results accomplished by these associations are manifested in different ways, dependent upon the character of the commodity manufactured or dealt in by the members and the existing market conditions. Through the influence of such a combination the prices of a commodity of uniform quality, like cement or linseed oil, under ordinary marketing conditions will be reduced to practically a dead level. However, when there is a sharp change in marketing conditions, as when the demand greatly increases or diminishes, there will necessarily be divergencies in prices till the demand and supply are again stabilized. If there were a marked subsidence at some point in the bottom of the ocean, it would require an appreciable time for the entire surface to again become level. Such a condition is illustrated by the prices of linseed oil during the existence of the Armstrong Bureau, as shown in the *Linseed Oil case* (262 U. S. 371).

When there is a wide difference in the quality and cost of production of the commodity, and especially if it is composed of many grades, like lumber, entire uniformity of prices is impossible. How-

ever, the variations will be much less when marketing conditions are normal than when abnormal. This is illustrated by the variations in the prices of lumber shown in the *Hardwood case* (257 U. S. 377). There the activities of the association actually produced a greater spread in prices. For illustration, the spread in prices of f. a. s. sap gum in January, 1919, was \$7.00, while in January, 1920, it had increased to \$22.50; and during the same period the spread in f. a. s. plain white oak increased from \$6.00 to \$81.25; and in No. 1 common poplar from \$5.00 to \$53.25. This, as this court found, was due to the activities of the association exerted upon the extraordinary economic conditions then existing.

The principal object of such an association is to enable its members to realize higher prices for their product; and therefore their practices are designed to press the prices upward. When a runaway market exists there is hardly any limit to the prices that may be obtained; but when conditions are normal there is a point beyond which prices can not be forced. As there must be leaders in every upward movement, there will necessarily be a variation in prices; but as the extreme point is approached the variations will decrease and prices will become nearer uniform.

Many of these associations do not seek uniformity. Their object is, not to eliminate *all* competition, but to destroy absolutely what they are pleased

to denominate "cut-throat" competition. They accomplish that end by agreeing either formally or tacitly upon a *minimum price*, which enables the most expensively manufactured goods to be sold at a profit, or at least not at a loss; and means are devised to enforce the agreement either by penalties or by moral force. Competition to sell *above* the minimum price is encouraged; *but that competition consists in each endeavoring to sell at a higher price than his competitors*. By so doing he makes a better showing among his fellows; and he knows that he will soon be imitated. This is exactly the character of the defendant association. According to the Government's theory the following should be the history of prices of flooring since the adoption and putting into effect of the last articles of association, which require among other practices the weekly distribution among the members of reports showing in detail the sales of competitors. When the first cost price list—really a minimum price list—was distributed some were selling below and some above the prices designated therein. Those selling above were not expected to, and did not reduce their prices to conform to the list, but those selling below raised their prices, probably gradually, until practically all sales were made *at or above* the designated prices.

In the meantime the competition to obtain higher prices than their competitors had caused many members to advance their prices. And when a

large per cent of them had made a substantial advance a new list was distributed with prices at a higher level. Of course, while the prices of many then conformed to or exceeded these new prices, some were selling below them, and a short time would be required for the prices of all to be advanced to the new level. New lists would be distributed just as often as the market would stand the strain. Therefore uniformity in figures need not be expected. But we may expect to find that a large per cent of the sales were made at the designated list prices, as it is only the bolder ones who take the initiative in advancing prices, and the others will not follow until they ascertain that the ground is secure. Furthermore, it may be expected that a number of sales will be found below the list prices, but they will gradually decrease after a new list has been adopted until another advance is announced.

So far as it possibly could after the data was received, the Government had tabulations made based on the weekly sales reports to ascertain how far the facts corroborate its contention. These tabulations constitute Exhibit 79, and most of them are printed in the record. (Vol. IV, pp. 583-796.) The evidence of Horace A. Lewis, a special agent of the Bureau of Investigation of the United States Department of Justice, who made the tabulations, and the discussion between court and counsel with reference to them, are found on pp. 846-859, Vol.

II, of the printed record. Briefly stated, the explanation of these tabulations is as follows:

The item 13/16" x 2 1/4" Maple Flooring, standard lengths, in the three grades clear, number one, and factory, was selected for the price comparison because it is the most representative. The 13/16" x 2 1/4" maple flooring constitutes approximately 70% of the entire amount of flooring produced by the members of the association, and the average percentages of the three grades produced are: Clear, 50%; No. 1, 35%; and Factory, 15%. The item 13/16" x 2 1/4" Clear Maple Flooring therefore constitutes approximately 35% of the total amount of flooring produced by the members. (Vol. IV, p. 842, Vol. III, side pp. 1622 and 2052.)

The tabulations based on the sales reports which were in the possession of the Government prior to the hearing in the court below were figured for the three grades, but those based on the reports which came into the possession of the Government during the course of the hearing were only figured for the clear grade because of the lack of time. Only the tabulations for the item 13/16" x 2 1/4" Clear Maple Flooring were therefore considered, and only those based on the sales reports for the weeks ending November 19, 1921, to June 30, 1923, inclusive, are printed in the record.

The procedure followed in making the tabulations was to take each sales report and to take from it and to set down on what Mr. Lewis called the tabulation sheet all the data given with reference

to each sale of the selected item. These sheets, therefore, have the same general appearance as the sales reports, and show in successive columns from left to right (1) the date of the order, (2) the number of the mill making the sale, (3) the quantity, (4) the delivered price per M, and (5) the average freight rate. These items of information are merely transcribed from the sales reports, except that during part of the period the sales reports give the index letters or freight-rate symbols, whereas the average or Cadillac freight rate is shown on all the tabulation sheets. Mr. Lewis testified, however, that in every case he decoded the freight symbols by using the freight-rate book. The next column is entitled "Actual freight allowed" and sometimes "Freight charged." It might more properly be termed "Actual Cadillac freight" or "Actual average freight," as it shows the freight per M feet calculated on the basis of the average freight rate shown on the sales report and of the association standard weight for the item of flooring under consideration of 2,000 pounds per M feet. The practice adopted for the association rate books is, however, followed and the nearest multiple of 25 is actually used for the "freight allowed." Each calculation was checked with the freight table showing the cost of freight per 1,000 ft., which is included in the July 19, 1923, Rate Book and Index of Towns. The data given in one other column on the tabulation sheets, "commissions," is transcribed directly from the sales reports.

A uniform practice was unfortunately not followed in presenting the remaining data on the tabulation sheets. The sheets which were prepared first show in the last column on the right what is called "Net Factory Price," which is the delivered price, less the freight, less the commission, if any. Other tabulation sheets show what is called sometimes "Net Price Cadillac" and sometimes "Price F. O. B. Cars at Mill." The columns so entitled show the delivered price less the freight. This might more properly be called the "Cadillac Base Price."

To determine whether the so-called "average costs" have been maintained as minimum prices, either of two methods could have been adopted for the purpose of comparing the prices actually obtained (as shown on the sales reports) with the so-called average cost; either the average cost *plus* the freight could have been compared with the delivered price reported (as was done on the sales reports during the operation of the January 6, 1921, Minimum Price Basis, as described heretofore on p. 39), or the delivered price reported *less* the freight could have been compared with the average cost. The Government chose the latter method, perhaps unfortunately, as the use of the former would not have given the appellants an opportunity to claim, as is done on pages 336-348 of their brief, *that the commission allowed, if any, should also have been deducted in order to arrive at the Cadil-*

lac base price. It is, however, frankly stated in the Appellants' Brief that that procedure, in accordance with which the elaborate calculations and charts appearing in the Brief and Appendices to the brief were prepared, *is based on the theory that what the seller received should be compared with the so-called "Average Cost."*

There is nothing in the record to sustain this contention, but every fact and circumstance is against it.

That the cost prices which were designated on the surveys of costs distributed among the members and were shown in the rate books, and which with the addition only of the average cost of freight—or Cadillac freight—were shown as the delivered costs or values on the sheets distributed for insertion in the rate books, were the ones to be observed in quoting prices and selling flooring regardless of whether or not a commission was allowed which made the seller's net realization less, is conclusively shown by the following facts:

(1) *The commission is actually embraced in the estimate of costs.* The questionnaire answered by the members, upon which answers the manufacturing and distributing costs are estimated, contains the following inquiry, "6. Selling expenses, including commissions and advertising and office expenses including selling administrative expenses." And in compiling the answers to the questionnaire sent out in May, 1922, the average of the replies to this question was \$3.75 (see p. 69). The manufacturing and selling expenses added to the costs

of rough lumber, including the waste, constitute the "average costs," which are shown in the rate books—and the estimates of costs which are from time to time distributed. *If the commission is already included in the estimated costs why should it again be added to ascertain whether a sale is made at or under the so-called cost price; or the same thing, why should it be deducted from the price at which the sale is made? The commission is included in the estimated costs to avoid the necessity of doing that very thing.*

(2) The sales reports show that a commission is generally paid, but they do not show in any instance whether it is allowed to the purchaser as a deduction from the quoted price, or to a wholesaler or a commission man for his services, or to a salesman in lieu of a salary. Mr. McLurg testified that the Kneeland-McLurg Company does not allow the retail dealer any commission because it sells through traveling salesmen, which costs more than on commission and that it allows some wholesalers a commission of \$1.50 to \$2.00 (Vol. I, p. 229), and Mr. Shepeck testified that the I. Stephenson Company allows very few wholesalers a commission as it does not care to sell through them, but that it allows a commission to brokers and even pays its own traveling salesmen on a commission basis instead of a salary. (Vol. I, p. 262.) Mr. Ralston testified that from 1919 to May, 1923, while he was sales manager for William Horner, the largest manufacturer in the association, eighty per cent of his flooring was sold through representatives who were

wholesalers in various cities in the country and to whom commissions were allowed; (Vol. I, p. 319); Mr. Hodges testified that the Oval Wood Dish Corporation sells largely to jobbers and wholesalers and to some big yards and allows commissions (Vol. I, p. 288); Mr. Greene testified that the West Michigan Flooring Company sells through representatives who guarantee the accounts and to whom commissions are allowed (Vol. I, p. 385); and Mr. Dewey testified that exclusive representatives at various points throughout the United States handle the flooring of the Kneeland-Bigelow Company on a commission basis (Vol. I, p. 393). No other defendant testified about the method of distributing the product and allowing commissions, and in accordance with the stipulation as to what the other defendants would have testified to if called (Vol. I, p. 409), it is perfectly clear that most if not all of the commissions shown on the sales reports were allowed to wholesalers, commission men, or traveling salesmen, in payment for their services in the distribution of the product. There is no evidence to support the contention made in the appellants' brief (p. 342) that the allowance of commissions is merely a means of meeting competition or reducing prices; and an examination of the depositions of dealers in Chicago, New York, Boston and Philadelphia, which were introduced in evidence by the defendants and appear in Vol. I and Vol. II of the Record, fails to disclose any instance of a price subject to commission being quoted to a retail dealer.

(3) The trial court was inclined to the view that the base prices with which the sales prices should be compared were the prices designated in the surveys of costs and in the rate books *less* a commission of \$2.00, that being the commission more often paid. This view is in fact borne out by the "Declaration of business policy," which accompanied Keehn's letter of September 16, 1921, wherein it was proposed to agree to pay 10% on all sales "at values below the average cost of production, plus the average cost of freight to destination * * * after allowing for commission not exceeding \$2.00 per M feet to wholesalers and commission men and to our special representatives." (Vol. IV, p. 568.) In other words the standard for determining whether the proposed agreement was violated was to be the comparison of the delivered price minus the commission with the average cost minus the commission plus the freight. An examination of all the Weekly Sales Reports for 1922 and 1923 which are printed in the record shows that the following commissions were allowed: 14 of \$1.00; 344 of \$1.50; 1244 of \$2.00; 3 of \$2.50, and 3 of \$3.00. The average of these commissions is \$1.89, and that undoubtedly represents about the amount included in the average costs for commissions allowed. No average cost figure or price stated otherwise than in even dollars has ever been established, and therefore if the delivered prices less the freight *and less the commissions, if any*, are to be compared with the average cost with any pretense of fairness, *two dollars must be deducted from the*

average cost. As stated by the trial court, therefore, the method actually adopted on the Lewis Exhibit was against the Government.

(4) The rate books and the surveys of cost issued by the present association state prices in elaborate detail, they being figured out and shown in the rate book for thousands of points; and there is not anywhere a hint that any consideration should be given to the allowance of a commission. *If the commission were regarded as an additional selling expense to be taken into consideration in making prices, that fact would certainly have been suggested at some time in some way.*

In paragraph 3 of Mr. Keehn's letter which accompanied the freight rate book of 1922 he explained:

For the further information of the members so called "Delivered Costs Charts" have been compiled. These charts include the Average Cost of Freight to destination of shipment; *in other words, the Average Cost of Freight is added to the Average Cost of the flooring f. o. b. cars at flooring mills to illustrate what the Delivered Cost would be at destination.* (Vol. III, p. 319.)

(5) The Minimum Price Plan of January 1, 1919, specified the commission which might be allowed "*from minimum prices in effect at time of sale.*" (Vol. III, p. 89.) In the Market Conditions Committee's report of June, 1919, with reference to "values of $\frac{3}{8}$ " it was said:

Please bear in mind that the $\frac{3}{8}$ " prices do not carry any concessions, but are net *being*

subject only to commissions to your registered special representatives and to registered wholesalers and commission men.

The Minimum Price Basis of January 6, 1921, did not specifically state that the commissions authorized might be allowed from the established minimum prices (Vol. III, p. 94), but the comparisons which the sales reports for January, 1921, made between the sales prices and the Minimum Price Basis prices as heretofore described on p. 39, show conclusively that that was the practice followed. There is therefore every reason to assume that the same understanding and practice as to the method of handling the allowance of commissions are still maintained.

(6) The prices actually considered, and very largely observed, were those designated in the surveys of costs and in the rate books. This is conclusively shown by the tabulations hereafter discussed.

The actual comparison between the average cost as determined from time to time and reported to the members by the association, and the prices at which the members sold 13/16" x 2 1/4" clear maple flooring as shown by the weekly sales reports but reduced to a Cadillac base in the manner heretofore described, is made on what Mr. Lewis called the recaption sheets.

In order to illustrate clearly the manner of making this comparison, and also the different forms of tabulation sheets which were prepared, both the

tabulation sheets and the recapitulation sheets of sales for the weeks ending, respectively, January 6, 1923, and June 30, 1923, are set forth in full below:

TABULATION SHEET

Net factory prices maple flooring, 1½ x 2¼, for week ending January 6, 1923

(Vol. IV, p. 735)

CLEAR

Date	Mill	Quantity	Delivered price	Freight rate	Freight charged	Commissions	Net factory price
14.....	2	8,502	107.50	0.24	4.75	2.00	100.75
30.....	2	22,000	100.50	.24	4.75	2.00	93.75
30.....	2	60,000	100.50	.24	4.75	2.00	93.75
29.....	2	2,000	108.25	.39	7.75	2.00	98.50
3.....	24	17,000	102.50	.37	7.50	1.00	94.00
3.....	33	5,000	100.50	.27	5.50	2.00	93.00
4.....	33	5,000	100.00	.25	5.00	2.00	93.00
4.....	33	5,000	98.75	.19	3.75	2.00	93.00
5.....	33	11,000	100.00	.25	5.00	.....	95.00
5.....	33	10,000	97.75	.19	3.75	1.00	93.00
2.....	5	5,000	103.50	.43	8.50	2.00	93.00
5.....	5	7,500	112.00	.85	17.00	1.50	93.50
2.....	14	25,000	98.00	.15	3.00	1.50	93.50
2.....	26	5,000	98.00	.16	3.25	2.00	92.75
2.....	30	15,000	103.50	.43	8.50	2.00	93.00
2.....	30	4,000	97.50	.19	3.50	.....	94.00
6.....	37	16,000	107.50	.62	12.50	2.00	93.00
29.....	47	10,000	102.50	.37	7.50	2.00	93.00
29.....	47	2,000	102.50	.37	7.50	2.00	93.00
2.....	47	14,500	101.00	.25	5.00	2.00	94.00
4.....	47	30,000	99.00	.20	4.00	2.00	93.00
4.....	47	10,000	102.00	.35	7.00	2.00	93.00
5.....	47	10,000	99.50	.20	4.00	2.00	93.50
2.....	4	8,000	99.20	.22	4.50	1.50	93.50
2.....	4	6,000	99.75	.24	4.75	1.50	92.50
2.....	4	2,000	101.00	.27	5.50	1.50	94.00
6.....	4	1,000	100.50	.27	5.50	1.50	93.50
6.....	4	5,000	100.50	.27	5.50	1.50	93.50
6.....	4	40,000	103.50	.27	5.50	1.50	96.50
3.....	7	20,000	109.75	.82	10.50	.....	99.25
4.....	7	1,000	97.50	Mill	.....	1.50	96.00
4.....	7	3,000	100.00	.25	5.00	.....	95.00
5.....	7	6,000	100.00	.20	4.00	1.50	94.50
6.....	7	10,000	98.00	.15	3.00	1.50	93.00
6.....	7	4,000	100.50	.27	5.50	.....	95.00
5.....	34	12,000	100.50	.27	5.50	2.00	93.00
29.....	50	4,000	100.50	.27	5.50	.....	95.00
29.....	48	12,000	105.00	.24	4.75	.....	100.25

High:

Low:

RECAPTION SHEET

Average cost for last quarter of 1922 (Vol. IV, p. 734), 13/16 x 2¼, Clear Maple Flooring, was \$95.00 F. O. B. Cars at Flooring Mills, as shown by Association Report dated Oct. 25, 1922, Captioned Average Cost—Based upon three test runs of 1921.

[Compiled from Record of Completed Transactions]

Report of sales made during the week ended January 6, 1923:

2 Sales @ \$94.00, total 14,000 ft.	}	----- 19,000 ft.=.043%
1 " " 94.75 " 5,000 "		
23 Sales @ \$95.00	----- 220,700 ft.=.508%	
2 Sales @ \$95.50, total 12,000 ft.	}	----- 195,302 ft.=.449%
2 " " 95.75 " 82,000 "		
2 " " 96.00 " 20,800 "		
1 " " 97.50 " 1,000 "		
1 " " 98.00 " 40,000 "		
1 " " 99.25 " 20,000 "		
1 " " 100.25 " 12,000 "		
1 " " 100.50 " 2,000 "		
1 " " 102.75 " 5,502 "		
38 Sales	----- 435,002 ft.=100%	

TABULATION SHEET

Net factory prices maple flooring 1½ x 2¼, clear

(Vol. IV, p. 796)

[Compiled from Record of Completed Transaction for week ending June 30, 1923]

Date	Mill	Quantity	Delivered price	Av. Frt. rate	Act. Frt. allowed	Price F. O. B. cars at mill	Com.	Net price F. O. B. cars at mill
6-25	2	24,000	108.50	0.18	3.50	105.00	2.00	103.00
6-27	-----	3,850	119.50	.23	4.50	115.00	2.00	113.00
6-22	49	2,500	122.00	.85	17.00	105.00	2.00	103.00
-----	-----	13,000	122.00	.85	17.00	105.00	2.00	103.00
6-30	-----	15,000	112.50	.63	12.50	100.00	2.00	98.00
6-27	5	41,500	122.00	.85	17.00	105.00	1.50	103.50
6-29	-----	17,000	109.00	.20	4.00	105.00	-----	105.00
6-25	-----	11,000	110.50	.27	5.50	105.00	2.00	103.00
6-30	-----	30,000	122.00	.85	17.00	105.00	1.50	103.50
6-30	-----	10,000	112.50	.37	7.50	105.00	1.50	103.50
6-28	26	5,000	108.50	.18	3.50	105.00	2.00	103.00
6-27	-----	1,000	113.00	.15	3.00	110.00	-----	110.00
6-26	-----	2,550	124.00	.85	17.00	107.00	2.00	105.00
6-25	30	12,000	110.50	.28	5.50	105.00	-----	105.00
6-27	-----	1,000	114.00	Mill	-----	114.00	-----	114.00
6-27	37	7,000	122.00	.85	17.00	105.00	2.00	103.00
6-25	47	20,000	105.00	Mill	-----	105.00	2.00	103.00
6-23	23	22,000	103.50	.27	5.50	98.00	-----	98.00
-----	-----	15,000	107.75	.38	7.50	100.25	-----	100.25
-----	-----	5,000	107.75	.38	7.50	100.25	-----	100.25
6-25	34	8,000	115.50	.52	10.50	105.00	2.00	103.00
6-28	-----	800	110.00	Mill	-----	110.00	-----	110.00
-----	-----	9,000	110.50	.27	5.50	105.00	1.50	103.50
6-23	42	8,800	115.50	.43	8.50	107.00	2.00	105.00
6-25	-----	17,000	123.50	.85	17.00	106.50	2.00	104.50
6-25	-----	3,000	111.75	.24	4.75	107.00	2.00	105.00
6-30	50	6,000	100.50	.27	5.50	95.00	-----	95.00
-----	48	23,000	120.00	.24	4.75	115.25	-----	115.25

RECAPTION SHEET

Average cost for second quarter of 1923 (Vol. IV, p. 795), 13/16 x 2¼ clear maple flooring was \$105.00 f. o. b. cars at flooring mill, as shown by report of the association dated March 24, 1923, captioned Average Cost—Based upon composite results of nine test runs.

[Compiled from record of completed transaction report of sales made during the week ending June 30, 1923]

1 Sale @ \$95.00	total	6,000 ft.	
1 Sale @ 98.00	"	22,000 ft.	
1 Sale @ 100.00	"	15,000 ft.	
2 Sales @ 100.25	"	20,000 ft.	
<hr/>			
5 Sales		63,000 ft.	=18.9%
14 Sales @ 105.00	total	210,000 ft.	=62.9%
1 Sale @ 106.50	"	17,000 ft.	
3 Sales @ 107.00	"	14,350 ft.	
2 Sales @ 110.00	"	1,800 ft.	
1 Sale @ 114.00	"	3,850 ft.	
1 Sale @ 115.25	"	23,000 ft.	
<hr/>			
9 Sales		61,000 ft.	=18.2%
<hr/>			
28 Sales		334,000 ft.	=100%

It is apparent that the base prices compared with the average cost of \$95.00 on the first recap-tion sheet above are not what are called the Net Factory Prices on the first tabulation sheet above but are those prices *plus the commission which had been deducted previously*. As explained above (p. 178), this is done in order to have the actual delivered sales prices reduced to the adopted price, but not to an actual mill realization basis.

A simple method of tabulation, and one that demonstrates the Government's contention that the commissions paid, if any, can not properly be con-

sidered when comparing the prices obtained by the members with the so-called average costs, is shown by refiguring and rearranging the tables above set forth (pp. 184, 186) as follows:

Week ending January 6, 1923—average cost or f. o. b. Cadillac price for 11" x 2 1/4" clear maple flooring, \$95.00, as per determination of average cost, October 25, 1922.

Delivered Price As reported on Sales Report	Delivered Cost Price as per Rate Book	Freight Rate As reported on Sales Report		Freight Computed as per Rate Book
		Rate	Index Letters	
107.50	99.75	0.24	BD	4.75
100.50	99.75	.24	BD	4.75
100.50	99.75	.24	BD	4.75
108.25	102.75	.39	CI	7.75
102.50	102.50	.37	CG	7.50
100.50	100.50	.27	BG	5.50
100.00	100.00	.25	BE	5.00
98.75	98.75	.19	AI	3.75
100.00	100.00	.25	BE	5.00
97.75	98.75	.19	AI	3.75
103.50	103.50	.43	DC	8.50
112.00	112.00	.85	HE	17.00
98.00	98.00	.15	AE	3.00
98.00	98.25	.16	AF	3.25
103.50	103.50	.43	DC	8.50
97.50	98.50	.18	AH	3.50
107.50	107.50	.62	FB	12.50
102.50	102.50	.37	CG	7.50
102.50	102.50	.37	CG	7.50
101.00	100.00	.25	BE	5.00
99.00	99.00	.20	BJ	4.00
102.00	102.00	.35	CE	7.00
99.50	99.00	.20	BJ	4.00
99.50	99.50	.22	BB	4.50
99.75	99.75	.24	BD	4.75
101.00	100.50	.27	BG	5.50
100.50	100.50	.27	BG	5.50
100.50	100.50	.27	BG	5.50
103.50	100.50	.27	BG	5.50
108.75	105.50	.52	EB	10.50
97.50		Mill		
100.00	100.00	.25	BE	5.00
100.00	99.00	.20	BJ	4.00
98.00	98.00	.15	AE	3.00
100.50	100.50	.27	BG	5.50
100.50	100.50	.27	BG	5.50
100.50	100.50	.27	BG	5.50
105.00	99.75	.24	BD	4.75

(NOTE.—A comparison of the first with the second column shows whether sales were made below, at, or above the so-called "Average Cost Price.")

SUMMARY

	Number of sales	Feet	%
Delivered Sales Less than Average Cost.....	3	19,000	04.4
Delivered Sales at Average Cost.....	23	213,500	80.0
Delivered Sales over Average Cost.....	12	195,302	45.6
Total.....	38	427,802	100.0

(NOTE.—The figures and percentages of feet sold appearing on this summary do not agree exactly with those on the first recaption sheet above (p.) as an error was made in totaling the sales at average cost on that sheet. The figures and percentages on this summary are correct.)

Week ending June 30, 1923—Average cost or f. o. b. Cadillac price for 1½" x 2¼" clear maple flooring \$105.00, as per determination of average cost, October 25, 1922

Delivered Price As reported on Sales Report	Delivered Cost Price as per Rate Book	Freight Rate As reported on Sales Report		Freight Com- puted as per Rate Book
		Rate	Index Letters	
108.50	108.50	0.18	AH	3.50
119.50	109.50	.23	BC	4.50
122.00	122.00	.85	HE	17.00
122.00	122.00	.85	HE	17.00
112.50	117.50	.63	FC	12.50
122.00	122.00	.85	HE	17.00
109.00	109.00	.20	BJ	4.00
110.50	110.50	.27	BG	5.50
122.00	122.00	.85	HE	17.00
112.50	112.50	.37	CG	7.50
108.50	108.50	.18	AH	3.50
113.00	108.00	.15	AE	3.00
124.00	122.00	.85	HE	17.00
110.50	110.50	.28	BH	5.50
114.00		Mill		
122.00	122.00	.85	HE	17.00
105.00		.28		
103.50	110.50	.27	BG	5.50
107.75	112.50	.38	CH	7.50
107.75	112.50	.38	CH	7.50
115.50	115.50	.52	EB	10.50
110.00		Mill		
110.50	110.50	.27	BG	5.50
115.50	113.50	.43	DC	8.50
123.50	122.00	.85	HE	17.00
111.75	109.75	.24	BD	4.75
100.50	110.50	.27	BG	5.50
120.00	109.75	.24	BD	4.75

SUMMARY

	Number of Sales	Feet	%
Delivered Sales <i>less</i> than Average Cost.....	5	63,000	18.9
Delivered Sales <i>at</i> Average Cost.....	14	210,000	62.9
Delivered Sales <i>over</i> Average Cost.....	9	61,000	18.2
Total.....	28	334,000	100.0

The results of the above calculations are of course exactly the same as the results of the comparisons shown on the recaption sheets set forth on pages 185, 187, but on account of the variations in delivered prices due to freight differentials, the method of comparison last used does not give the information as to the actual spreads in prices that is given by reducing all the actual prices reported to a common basis.

All the Freight Rate Books, Tables of Values, Tables of Delivered Values, Average Cost Charts, Delivered Cost Charts, and Tables of Concessions and Additions secured by the Government were introduced in evidence; and all those relating to the period from January 1, 1921, to June 30, 1923, were used as the basis for the comparisons between the actual prices reported and the average costs. The following table gives the several average costs established during the period from November 12, 1921, to June 30, 1923, and the references to the tables or charts printed in the record on which they appear:

Average Cost F. O. B. Cadillac, 11" x 2 1/4" Clear Maple Flooring	Date Estab- lished	Title of Reports in Record	Reference
\$90.00.....	Nov. 17, 1921	Letter to Members, November 17, 1921.	Vol. III. p 143.
\$90.00.....	May 31, 1922	Survey of Costs, May 31, 1922... Rate Book and Average Cost Charts, etc., May 31, 1922.	Vol. III, pp. 279-281. Vol. III, side pp. 737- 905.
\$95.00.....	Oct. 25, 1922	Survey of Costs, October 25 1922.	Vol. III pp. 284-286.
\$100.00.....	Feb. 15, 1923	Survey of Costs, February 15, 1923. Tables of Differentials and Average Cost Charts, Febru- ary 15, 1923.	Vol. III, pp. 287-289. Vol. III side pp. 910- 929.
\$100.00.....	March 11, 1923	Survey of Costs, March 10, 1923.	Vol. IV, pp. 497-499.
\$105.00.....	March 24, 1923	Survey of Costs, March 24, 1923.	Vol. IV, pp. 499-501.

It should be kept in mind that the present articles of association were not adopted until some time in March, 1922. Prior to that time the association was in a rather chaotic condition, because of the decision of the lower court in the Hardwood case and the suggestion of a criminal prosecution by the Department of Justice. *But defendants were seeking a method by which closer cooperation could be observed. This was accomplished by the full and detailed reports of members and their distribution by the secretary, and through the meetings which were begun to be held monthly.* By October 25, 1922, the date of the first advance on this item after the adoption of the present articles, the scheme was working smoothly; and the data thereafter is especially interesting. However, the results of the comparisons which appear on all the recaption sheets printed in the record are shown below, in summarized and tabulated form:

Comparison of sales of 1½" x 2¼" clear maple flooring as reported by members and reduced to Cadillac Basis with average costs reported to members

Sales report for week ending—	Sales at average cost price as calculated by Association and distributed to members			Sales above average cost price			Sales below average cost price		
	Number of sales	Feet	Per cent of entire feet sold	Number of sales	Feet	Per cent of entire feet sold	Number of sales	Feet	Per cent of entire feet sold
1921									
Nov. 19.....	3	67,500	5.1	2	7,953	0.7	66	1,232,567	94.2
Nov. 26.....	10	153,750	21.4	7	43,109	6.9	34	520,636	72.5
Dec. 3.....	15	321,500	30.1	14	269,734	44.5	11	473,000	25.4
Dec. 10.....	13	132,217	32.6	6	24,511	6.2	12	248,050	61.2
Dec. 17.....	11	126,300	46.3	8	35,259	5.2	8	133,000	48.5
1922									
Jan. 14.....	9	131,100	43.8	6	45,395	15.1	2	123,000	41.1
Jan. 21.....	18	179,000	54.3	4	11,010	3.4	11	139,300	42.3
Jan. 28.....	13	280,700	76.6	6	13,557	3.7	5	72,200	19.7
Feb. 4.....	7	84,187	38.2	8	15,956	7.3	10	120,000	54.5
Feb. 11.....	21	177,000	34.9	8	28,052	5.5	16	302,356	59.6
Feb. 18.....	7	31,450	12.6	8	33,240	13.4	6	184,300	74.0
Feb. 25.....	11	78,000	46.0	8	29,277	17.2	5	62,500	36.8
Mar. 4.....	18	203,100	66.2	5	17,682	5.5	10	86,000	28.3
Mar. 11.....	9	86,288	52.0	7	39,642	23.9	3	40,000	24.1
Mar. 18.....	23	122,872	39.7	7	73,168	23.6	10	113,500	36.7
Mar. 25.....	20	235,000	58.3	9	37,740	5.8	22	382,500	35.9
Apr. 1.....	10	91,460	37.7	3	18,264	7.7	8	132,500	54.6
Apr. 8.....	26	240,500	46.6	4	21,880	4.3	16	253,500	49.1
Apr. 15.....	24	216,700	25.2	3	18,922	2.2	29	626,300	72.6
Apr. 22.....	22	186,500	32.3	2	15,545	2.8	20	374,700	64.9
Apr. 29.....	46	461,700	53.2	4	36,980	4.3	22	369,000	42.5
May 6.....	29	436,700	54.5	5	36,600	4.7	23	327,000	40.8
May 13.....	42	528,000	56.7	13	133,519	15.5	13	268,500	27.8
May 20.....	35	664,450	78.1	10	76,018	9.0	14	109,576	12.9
May 27.....	74	834,400	61.3	16	244,828	18.0	17	281,320	20.7
June 3.....	5	914,865	70.7	12	105,449	8.2	11	272,800	21.1
June 10.....	49	634,840	58.4	20	205,200	18.9	11	246,900	22.7
June 17.....	37	557,250	77.2	14	135,141	18.8	3	29,000	4.0
June 24.....	32	485,210	71.3	10	127,750	19.5	8	67,400	9.2
July 1.....	41	577,532	52.9	43	430,042	30.5	8	83,775	7.6
July 8.....	25	456,926	67.2	21	200,437	29.6	1	22,000	3.2
July 15.....	11	175,373	31.7	23	249,186	45.3	7	127,000	23.0
July 22.....	15	252,043	30.2	38	384,939	59.9	1	5,000	.9
July 29.....	12	139,500	23.5	28	445,100	74.6	1	9,000	1.9
Aug. 5.....	14	211,500	36.6	23	337,290	58.5	2	28,000	4.9
Aug. 12.....	8	122,000	23.6	29	394,000	76.4			
Aug. 19.....	13	150,000	25.3	38	442,171	74.7			
Aug. 26.....	6	179,000	25.2	46	579,879	74.8			
Sept. 2.....	5	53,450	6.6	43	734,695	91.5	1	16,000	1.9
Sept. 9.....				35	469,187	100.0			
Sept. 16.....	1	1,500	0.3	44	436,339	99.7			
Sept. 23.....				50	668,630	97.8	3	14,500	2.2
Sept. 30.....				56	781,600	100.0			
Oct. 7.....				28	503,322	100.0			
Oct. 14.....				49	815,100	100.0			

Comparison of sales of 1½" x 2¼" clear maple flooring as reported by members and reduced to Cadillac Basis with average costs reported to members—Continued

Sales report for week ending—	Sales at average cost price as calculated by Association and distributed to members			Sales above average cost price			Sales below average cost price		
	Number of sales	Feet	Per cent of entire feet sold	Number of sales	Feet	Per cent of entire feet sold	Number of sales	Feet	Per cent of entire feet sold
Oct. 21.....				50	924,181	100.0			
Oct. 28.....	31	571,500	78.4	7	97,801	11.9	5	72,500	9.7
Nov. 4.....	27	526,000	78.2	8	84,300	12.6	5	62,000	9.2
Nov. 11.....	29	477,000	71.9	14	133,400	20.2	4	53,000	7.9
Nov. 18.....	12	229,000	46.4	4	114,500	23.2	2	150,000	30.4
Nov. 25.....	34	425,700	63.0	11	163,699	24.4	5	86,039	12.6
Dec. 2.....	26	489,101	73.4	9	124,400	18.7	5	53,000	7.9
Dec. 9.....	25	583,000	83.0	8	105,252	15.1	3	14,000	1.9
Dec. 16.....	43	966,350	82.1	15	150,145	12.8	3	60,000	5.1
Dec. 23.....	34	736,501	83.3	12	138,539	15.6	2	9,000	1.1
Dec. 30.....	33	668,619	73.6	12	135,300	15.0	5	104,000	11.4
1923									
Jan. 6.....	23	220,700	50.8	12	195,302	44.9	3	19,000	4.3
Jan. 13.....	46	1,262,800	91.4	9	63,740	4.7	4	55,000	3.9
Jan. 20.....	95	1,739,050	86.8	7	70,000	3.4	7	194,000	9.6
Jan. 27.....	91	1,287,000	85.2	17	194,000	12.8	5	31,000	2.9
Feb. 3.....	63	1,302,957	80.0	24	206,800	12.6	7	128,000	7.4
Feb. 10.....	14	409,000	39.2	30	603,350	58.0	3	29,000	2.8
Feb. 17.....	16	269,500	29.2	34	626,300	68.0	1	26,150	2.8
Feb. 24.....	36	696,000	59.8	16	309,800	25.9	8	167,000	14.3
Mar. 3.....	31	552,000	76.4	14	118,870	16.4	5	52,000	7.2
Mar. 10.....	22	385,600	53.3	18	271,839	37.4	3	67,000	9.3
Mar. 17.....	21	322,000	54.0	13	204,000	34.1	4	71,000	11.9
Mar. 24.....	26	398,000	42.4	24	466,300	49.7	5	74,000	7.9
Mar. 31.....	7	104,000	19.9	5	121,200	23.2	16	297,400	56.9
Apr. 7.....	15	362,000	64.9	5	89,000	16.0	12	106,800	19.1
Apr. 14.....	26	396,700	71.1	9	114,689	23.0	4	32,500	5.9
Apr. 21.....	12	134,000	35.2	13	233,100	61.1	2	14,000	3.7
Apr. 28.....	11	526,325	73.6	10	174,051	24.3	1	15,500	2.1
May 5.....	12	222,300	55.8	10	161,420	40.4	2	15,000	3.8
May 12.....	8	131,100	41.9	9	177,970	57.1	1	3,303	1.0
May 19.....	6	45,000	43.4	6	58,500	56.6			
May 26.....	4	157,500	46.2	15	176,010	51.3	2	7,000	2.5
June 2.....	6	47,000	14.4	17	147,220	61.6	4	61,500	24.0
June 9.....	1	5,000	9.2	3	39,905	73.4	2	9,500	17.4
June 16.....	4	21,000	27.0	4	14,450	16.6	4	46,000	56.4
June 23.....	9	123,500	59.7	11	83,200	40.3			
June 30.....	14	210,000	62.9	9	61,000	18.2	5	63,000	18.9

(NOTE.—The brief for appellants (pp. 345-346) calls attention to the fact that for the weeks ending September 30, October 7, October 14, and October 21, 1922, the recaption sheets compare the Cadillac Base prices with the average cost dated October 25, 1922, or \$95.00, instead of with the earlier lower average cost of May 21, 1922, or \$80.00. The error obviously was not unfair to the defendants, as it represented some sales as having been made at prices less than the average cost, which the Government contends is a *minimum price*, whereas the correct comparison shows that during those weeks *every sale was made at a price above the minimum price*. The corrected figures have been used in the above tabulation.)

The following tables give summaries of the above figures for: (1) Each month of the period from November 19, 1921, to June 30, 1923; (2) The period from November 19, 1921, to March 25, 1922, or until the reorganization of the Association was consummated by the adoption of the present articles of association; (3) The period from April 1, 1922, to June 30, 1923, or the entire period of the operation of the Association under its present articles of association; (4) The period from October 28, 1922, to June 30, 1923, when the Association was operating smoothly and was preparing and sending out Surveys of Costs at least quarterly, as provided for in the present articles of association, and (5) The entire period from November 19, 1921, to June 30, 1923.

The results shown clearly demonstrate that there has been a remarkable uniformity in the delivered prices charged by the defendants, and an even more remarkable observance of the so-called average costs as minimum prices, especially during the operation of the association under its present articles.

TABLE I

Period	Sales at average cost			Above			Below		
	No. sales	Feet	Per cent	No. sales	Feet	Per cent	No. sales	Feet	Per cent
1921									
Nov.....	15	221,250	10.9	9	51,062	2.5	100	1,753,283	86.6
Dec.....	36	580,017	31.8	26	329,504	21.5	31	854,050	46.7
1922									
Jan.....	40	590,800	50.3	16	69,952	7.0	18	334,500	33.7
Feb.....	46	370,637	32.3	32	106,525	9.3	37	659,156	58.4
March.....	70	647,260	45.1	28	169,232	11.8	45	622,060	43.1
April.....	128	1,196,860	30.1	16	111,501	3.6	96	1,756,060	57.3
May.....	200	2,463,550	62.5	44	460,965	12.5	67	980,396	25.0
June.....	123	2,592,165	68.5	56	573,549	15.2	23	616,100	16.3
July.....	104	1,001,374	45.0	153	1,709,704	48.1	18	266,775	6.9
Aug.....	41	662,500	27.1	136	1,753,340	71.7	2	28,000	1.2
Sept.....	6	54,950	1.7	226	3,090,451	97.3	4	30,500	1.0
Oct.....	31	571,500	19.2	134	2,340,404	78.4	5	72,500	2.4
Nov.....	162	1,657,500	66.2	37	465,899	19.8	16	251,039	14.0
Dec.....	161	3,443,571	79.4	56	633,636	15.0	18	240,000	5.6
1923									
Jan.....	268	4,300,550	84.6	45	523,042	9.8	19	299,000	5.6
Feb.....	129	2,677,457	58.2	104	1,737,250	36.5	19	350,150	7.3
March.....	107	1,761,000	50.3	74	1,182,269	33.7	33	561,400	16.0
April.....	64	1,419,025	64.5	37	610,840	27.7	19	148,800	7.6
May.....	30	555,900	48.1	40	573,900	49.7	5	25,303	2.2
June.....	34	406,500	43.6	44	345,775	37.1	15	180,000	19.2
Total period.....	1,725	27,984,106	50.8	1,317	16,917,831	30.8	509	10,144,872	18.4

TABLE II

Period	Sales at average cost			Above			Below		
	No. sales	Feet	Per cent	No. sales	Feet	Per cent	No. sales	Feet	Per cent
Nov. 19, 1921, to March 25, 1922.....	210	2,400,964	32.7	113	725,283	9.8	231	4,232,969	57.5
April 1, 1922, to June 30, 1923.....	1,515	25,574,292	53.6	1,206	16,192,546	33.9	368	5,911,663	12.4
Oct. 28, 1922, to June 30, 1923.....	913	17,002,863	66.8	444	6,226,352	24.4	149	2,218,192	8.8
Nov. 19, 1921, to June 30, 1923.....	1,725	27,984,106	50.8	1,317	16,917,831	30.8	509	10,144,872	18.4

An analysis of the recaption sheets clearly demonstrates the soundness of the Government's contentions that the so-called average costs are in fact

recommended prices, and that they exert a strong influence upon, in fact largely control, the selling prices. The so-called "Average Cost price" was advanced from \$90 to \$95 on October 25, 1922. In September 97.3% of the flooring marketed was sold at prices above \$90 and 1.7% at that price, leaving only 1% sold below the pretended average cost. The advance therefore was made to establish a price which was already being received for a considerable amount of the flooring then sold. And notwithstanding the advance, 78.4% of the flooring sold in October brought more than, and 19.2% brought exactly, the designated price, leaving only 2.4% that sold for less than such price. The fact that 14% was sold for less than the designated price in November does not indicate that the price had been reduced. That resulted from the fact that \$95 per M was the adopted price for the whole of November, while \$90 was the adopted price in October up to the 25th day of the month.

The sheet for the week ending January 6, 1923, shows that only three sales were made under \$95.00 per M; that the prices on two of these sales were only \$1.00 per M and the price on the other was only 25c per M below, and that the total amount of these sales was only 19,000 ft., or 4.3% of the total volume sold during the week. The same sheet shows that *23 sales, totaling 220,700 ft., or 50.8% of the entire amount, were made exactly equal to the adopted price*, and that twelve sales aggregating

195,302, or 44.9% of the total amount, were made above such price. (Vol. IV, p. 734.)

No material changes in the comparative results appear on the recaption sheets for the weeks ending, respectively, January 13, January 20, and January 27, 1923, except that the number and volume of sales made exactly equal to the adopted price were much larger. The figures for those weeks are as follows:

Sales at base price exactly equal to average cost for item of \$95.00

Week ending	Sales	Ft.	% of total
January 13.....	46	1,262,800	91.4
January 20.....	95	1,739,050	86.8
January 27.....	91	1,287,000	85.2
February 3.....	63	1,302,957	80.0

For the same weeks the volume of sales made below such price were, respectively, 55,000 ft., or 3.9%; 194,000 ft., or 9.6%; 31,000 ft., or 2%; and 128,000 ft., or 7.4%, and during the first three of those weeks 71% of the total volume of the sales below and above the adopted price did not vary from it more than \$1.00 per M. (Vol. IV, pp. 736, 739, 743, 747.)

The price of \$100.00 per M, which was adopted February 15, 1923, first appears on the sheet for the week ending January 20, 1923, as the price on one small sale. It is the highest price appearing on that sheet. One small sale at the same price appears on the sheet for the week ending January 27, but on the sheet for the week ending February 3,

there are 12 sales for a total of 125,000 ft. at the \$100.00 per M price. This represents 60% of the total volume sold above the established price of \$95.00.

The sheet for the week ending February 10 (Vol. IV, p. 751) shows 3 sales totaling 29,000 ft. or 2.8% of the entire amount, made under the established price, 14 sales totaling 409,000 ft., or 39.2% of the entire amount made at exactly that price, and 30 sales totaling 603,350 ft., or 58% of the entire amount, made above it. Eighteen sales aggregating 513,100 ft., or 85% of the volume sold for more than such price, were made at the \$100.00 per M. *Therefore \$100.00 per M was accepted as the prevailing price for 13/16" x 2 1/4" Clear Maple flooring, and it was so established on February 15, 1923.*

The sheet for the week ending February 17, of course, does not reflect to any considerable extent any results from the distribution to the members of the increased average cost. The comparison for that week is therefore still made with the \$95.00 average cost. The sheet shows 1 sale, aggregating 26,850 ft., or 2.8% of the total, at a price below the average cost; 16 sales, aggregating 269,500 ft., or 29.2% of the total, at the average cost price; and 34 sales, aggregating 626,300 ft., or 68% of the total, above the average cost price. Twenty-one sales, for a total of 357,100 ft., or 38.7% of the total, were made at the \$100.00 base price. (Vol. IV, p. 754.)

The sheets for the weeks ending February 24 and March 3 show clearly the results accomplished by sending out the Association report dated February 15, which established the increased average cost. For the week ending February 17 twenty-two sales, aggregating 436,850 ft., or 47.4% of the total, were sold at prices less than \$100.00, *but for the week ending February 24 only 8 sales, aggregating 167,000 ft., or 14.3% of the total, were sold at prices below the new average cost price of \$100.00 per M; and for the week ending March 3 only 5 sales, aggregating 52,000, or only 7.2% of the total, were sold at prices below the average cost.* For the former week, five and for the latter three of the lower sales appearing on the two sheets were made at \$95.00, the old average cost price. For the same weeks there were, respectively, 36 sales, aggregating 696,000 ft., or 59.8% of the total, and 31 sales, aggregating 552,000 ft., or 76.4% of the total, made exactly at the base price of \$100.00. (Vol. IV, pp. 757, 760.)

The sheets for the weeks ending respectively March 10 and March 17 show respectively three sales aggregating 67,000 ft., or 9.3% of the total amount, and four sales aggregating 71,000, or 11.9% of the total amount, at prices less than the average cost; 22 sales aggregating 385,600 ft., or 53.3% of the total amount, and 21 sales aggregating 322,000 ft., or 54% of the total amount at prices exactly equal to the average cost; and 18 sales aggregating 271,839 ft., or 37.4% of the total amount, and 13

sales, aggregating 204,000 ft., or 34.1% of the total amount at prices above the average cost. (Vol. IV, pp. 763, 765.)

The price of \$105.00 first appears on the sheet for the week ending February 24. The sheets for that and the following weeks show:

Sales at \$105.00

Week ending	Sales	Feet	Per cent of total amount sold
February 24.....	2	8,000	0.7
March 3.....	7	58,370	8.0
March 10.....	10	197,000	27.3
March 17.....	6	119,000	19.9

A Survey of Costs dated March 10, 1923, was prepared and distributed to the members, but it did not make any change in the average cost for 13/16" x 2 1/4" Clear Maple Flooring. Another Survey of Costs dated March 24 was prepared and distributed, and it adopted the base price of \$105.00 as the new increased average cost.

The sheet for the week ending March 24 shows 5 sales aggregating 74,000 ft., or 7.9% of the total amount, made at prices less than the average cost, the \$100.00 average cost of February 15, of course, being still used as the basis of comparison, 26 sales aggregating 398,000 ft., or 42.4% of the total amount made at the prices exactly equal to the average cost, and 24 sales aggregating 466,300 ft., or 49.7% of the total amount, made at prices higher than the average cost. Fifteen of these sales ag-

gregating 242,300 ft., or 25.8%, of the total amount, were made at the price of \$105.00 per M.

The full effect of the Survey of Costs dated March 24, 1923 (Saturday), could not of course be reflected in the sales for the week ending the next Saturday, March 31, but the sheet for that week nevertheless makes the comparison with the new average cost of \$105.00. On that basis it shows 16 sales aggregating 297,400 ft., or 56.9% of the entire amount made at prices less than the average cost; seven sales aggregating 104,000 ft., or 19.9% of the entire amount made at the average cost price, and 5 sales aggregating 121,200 ft., or 23.2% of the entire amount made at prices above the average cost. Nine sales aggregating 151,500, or 28.9% of the entire amount, were sold at the old average cost price of \$100.00, and if that had been used as the basis of comparison, only 3 sales representing .5% of the entire amount would have been sold below the average cost price.

The sheets for the weeks ending April 7 and April 14 reflect the full effect of the action establishing the increased average cost at \$105.00 per M. They show:

Sales at price exactly equal to new average cost of \$105.00

Week ending	Sales	Feet	Per cent of total amount sold
April 7.....	15	362,000	64.9
April 14.....	26	396,700	71.1

The same sheets show respectively 12 sales aggregating 106,800 ft., or 19.1% of the total amount, and 4 sales aggregating 32,500 ft., or 5.9% of the total amount, at prices below the average cost, but of these sales, respectively 5 sales aggregating 41,000 ft., or 38.4% (of amount sold below average cost), and 3 sales aggregating 28,000 ft., or 81.6%, were made at the old average cost.

In Appendices U and V to appellants' brief comparisons are made between the actual prices *for certain items* appearing on *a few sales reports*, with the established average costs of those items. Both the average freight and the commission allowed, if any, are deducted from each price reported, and the results, called the "net prices f. o. b. mill basis," are compared with the average costs. As demonstrated heretofore, this procedure creates an entirely false appearance unless the average commission, or \$2.00, is also taken out of the average costs before making the comparisons, but this is not done. The same comparisons made in a correct manner show entirely different results, but for the following reasons a complete analysis of the correct comparisons would not give sufficient additional information to warrant the necessary expansion of this brief.

1. Appendix U to appellants' brief only makes comparisons between the average costs and certain prices appearing on the Sales Reports for the weeks ending March 4, 1922; May 20, 1922; June 3, 1922;

June 17, 1922; August 19, 1922; September 30, 1922; October 21, 1922; December 2, 1922; February 3, 1923; February 24, 1923, and March 17, 1923. *The appellants' brief does not explain how these scattered reports were selected for the purpose of making the comparisons, or why two reports were selected for some months while other months were disregarded entirely; but even if an impartial selection had been made, as very apparently was not the case, and, say, the first or last report for each month had been selected as fairly representative of all, such a method of comparison could not possibly disclose the results of the combination as effectively as do the tables heretofore set forth with reference to all sales of the most representative item of maple flooring,—to 35% of the defendant's entire business.*

2. No costs were established by the present association until May 31, 1922, and the comparisons of the prices appearing on the reports for the weeks ending March 4 and May 20, 1922, are made with the costs established on November 17, 1922. The time intervening between the dates of the costs and of the sales makes these comparisons practically valueless; especially as during that time the association's activities were in a rather chaotic condition while a plan was being devised which it was hoped would evade the effect of the decision by this court in the Hardwood Case. As might be expected from the circumstances, these reports do

not show any general conformity of the actual prices to the established costs.

The survey of costs dated May 31, 1922, did not change the cost prices of any item of clear flooring, but did increase the cost price of each item of No. 1 flooring \$10.00 per M and of each item of Factory flooring \$5.00 per M. It is therefore not fair to compare these new cost prices with the prices appearing on the report for the week ending June 3, 1922, and even the prices appearing on the report for the week ending June 17, 1922, can not alone give a true and complete picture of the results achieved by the May recommendation. However, these reports disclose the following interesting situations:

13/16" x 1½" No. 1 Maple Flooring. The report for the week ending May 20, 1922, shows 4 sales totaling 82,000 ft., or 63% of the entire amount at the average cost price of \$58.00; 2 sales totaling 8,000 ft., or 6% of the entire amount under and 4 sales (all at \$63.00 per M.), totaling 41,000 ft., or 31% of the entire amount over that price. Nevertheless the survey of costs dated May 31, 1922, increased the price of this item to \$68.00, or five dollars over the highest sales price theretofore reported; and all the sales appearing on the report for the week ending June 3, 1922, were made at exactly the new established price. The report for the week ending June 17, 1922 shows three large mill sales of this item at \$63.00 per M., which would

appear to be due to some special consideration, as otherwise the report shows only one sale of 20,000 ft. which was made at the old cost price of \$58.00 and 5 sales totaling 37,000 ft. made at the new cost price.

13/16" x 2" No. 1 Maple Flooring. The report for the week ending May 20, 1922, shows one sale of 8,606 ft., or 31% of the total amount at the \$62.00 cost price, two sales totaling 17,500 ft., or 64% under that price and one sale of 1,455 ft., or 5% over it, at \$68.25. Yet the Survey of Costs dated May 31, 1922, increased the price of this item to \$72.00; and the effect of this is shown by the fact that on the report for the week ending June 3, 1922, the lowest price for this item was \$67.00 and the highest was \$75.00, although none of the three sales reported was made at exactly the new cost price. Apparently the entire recommended increase on this item was not made effective, at least immediately, as the report for the week ending June 17, 1922, shows only one sale at the \$72.00 cost price, one over it, and five under—66% of the entire quantity being sold at \$67.00, or \$5.00 over the old cost price.

13/16" x 2 1/4" Factory Maple Flooring. The report for the week ending March 4, 1922, shows no sales at the cost price of \$25.00, and only 5 small sales totaling 27,650 ft., or 9% of the entire amount, at higher prices. The report for the week ending May 20, 1922, shows six sales totaling 26,767, or 7%

of the entire amount sold over the cost price of \$25.00; 12 sales totaling 65,000 ft., or 16% at, and 23 sales totaling 315,000 ft., or 77% under that price. The highest price obtained on any sale was \$29.75. *Nevertheless the cost price was increased to \$30.00 on the May 31, 1922 Survey of Costs. The report for the week ending June 3, 1922, shows the immediate effect of that action, as 8 sales were made by seven different members of the association at exactly the new established price.* The prices on the factory items on all the sales reports vary much more than do those of the clear and No. 1 items, undoubtedly because the factory flooring under normal conditions is practically a by product from the manufacture of the better grades; and the effect of the increase in its cost price is best shown by the changes in the spreads and in the average prices. The following table shows these factors:

Week ending—	Low price	High price	Average price	Cost price
March 4, 1922	\$17.50	\$39.00	\$22.89	\$25.00
May 20, 1922	16.50	31.00	23.07	25.00
June 3, 1922	18.50	30.50	26.33	30.00
June 17, 1922	20.25	42.25	28.97	30.00
August 19, 1922	24.25	42.25	33.44	30.00

The instances cited show that the increases in the prices recommended by the Survey of Costs dated May 31, 1922 were not justified by the prices theretofore actually obtained, but that the prices obtained nevertheless responded immediately to the recommendations. In these instances it is obvious that the so called costs did not follow the prices, as

the appellants' brief (p. 346) claims, but that the prices followed the costs.

3. The appellants' brief on pp. 345-346 criticizes the government for comparing the prices on the reports for the weeks ending September 30 to October 28, 1922, inclusive, with the average costs established by the Survey of Costs dated October 25, 1922—which made increases over the cost prices established on May 31, 1922, on all but three items. The error in the comparisons made by the Government was in favor of the appellants, but although the appellants claim that the compilation of the Lewis Exhibit on that basis was very unfair, *they nevertheless adopt the same error in their favor in making the comparisons between the average costs and the prices on the reports for the weeks ending September 30 and October 21, 1922.* Appendix U to the appellants' brief, pp. 11-14, therefore, shows nearly all the sales prices as less than the cost prices, but the same comparisons when made correctly show that practically all the prices reported were above the cost prices established May 31, 1922.

4. In selecting the additional data (Additional Exhibits, pp. 1-48) for use in comparing prices and average costs, appellants omitted entirely the item of 13/16" x 2 1/4" No. 1 flooring, although it represents approximately 24.5% of the defendants' entire business, and is second in that respect only to the item of 13/16" x 2 1/4" Clear which the Government

used for the comparisons in the Lewis Exhibit. The only item selected by appellants for their comparisons which represents any considerable volume of sales is the 13/16" x 2 1/4" Factory; and it represents only approximately 10.5% of the defendants' entire business. On the basis of value it is of course even less important. The reason for the selection of the items used in Appendix U to appellants' brief is apparent from the testimony of Mr. Saunders to the effect that they are practically by-products from the manufacture of the important items of 13/16" x 2 1/4" Clear and No. 1 flooring. Mr. Saunders' testimony also makes it clear that any failures to maintain the agreed minimum prices, as well as the present average costs or recommended minimum prices, undoubtedly relate to the relatively unimportant items of flooring. He said:

The architects of the country very largely control the width of flooring. In some localities you can not sell 3 1/4-inch face or 1 1/2-inch face. In working up our lumber in the most economical method known in order to take care of our widths and avoid waste, we must make a certain amount of 3 1/4-inch and an inch and a half and two inch faces. It is necessary for us to sell such widths in the markets where they are used, regardless of price, when our surplus gets to a point where we feel that we must unload.

It was impracticable to maintain the so-called minimum price plans for the reason that these various widths and grades, par-

ticularly the widths, would be dumped in the markets that were using them. For instance, the Eastern market uses—and it is practically the only market that does—3¼-inch face. I dare say when a 3¼-inch order goes out, everybody is right after it because that is one of the widths that accumulates on our hands. The 2¼-inch face is a standard article, and the architects of the country have gotten into the habit of ordering it, almost exclusively, regardless of whether it is in abundance or not. Possibly 75 per cent of our production of flooring is 13/16 by 2¼-inch face (Vol. I, p. 199).

5. Appendix V to appellants' brief makes comparisons similar to those in Appendix U, but based on the prices appearing in the sales reports for the weeks ending October 1, 1921; January 14, 1922; April 1, 1922; July 7, 1923; July 12, 1923; July 21, 1923, and November 3, 1923. The appellants' brief insists very earnestly that the present association should be judged solely by its expressed purposes and activities, without any reference to the defendant's previous activities for interpretation and clarification—yet in these comparisons presumably made to show the lack of effect of the present association's activities, only data are used which appear on sales reports either antedating the first determination of average cost by the present association; or postdating the filing of the Government's petition, the decision by the court below that

the petition states a cause of action, and the setting of the case for hearing. No analysis will therefore be made of the comparisons shown in this appendix.

XI

Economic Defense

The defendants introduced in evidence in the court below the depositions of Edward Gordon, Grant Keehn, Professor Hettinger, and Professor Vanderblue, statisticians and economists either now or formerly connected with the Harvard School of Business Administration. Mr. Gordon and Mr. Keehn explained a number of comparative charts and tables which were introduced as exhibits to their depositions, and on the basis of which they testified that, as stated by Mr. Keehn—

the study which Mr. Gordon and I made developed data and material such as to clearly indicate that the members of the Association did not have the ability to continuously control the prices of maple flooring, or, even if it be assumed that they had such ability, comparisons with other prices, with prices of competing floorings, with the costs of maple flooring, and with the conditions of supply and demand of that product, do not offer any evidence of fixation or unreasonableness. (Vol. II, p. 714.)

Professor Hettinger and Vanderblue testified that they had reviewed the work of Mr. Gordon and Mr. Keehn and concurred in their conclusions.

The charts and tables introduced in connection with the defendants "economic defense" covered the period from 1913 through the first half of 1923, and the conclusion that they do not offer any evidence of the fixation or control of the prices of maple flooring of course pertains to the same period. According to these statisticians and economists, therefore, they have conclusively demonstrated that the agreements, called the Allotment Articles and the Minimum Price Plans and the Minimum Price Basis of the Maple Flooring Manufacturers Association, and the operation of the association and its members under and in accordance with those agreements; the practice of having a committee of experts, called the Market Conditions Committee, analyze statistics and conditions and advise the association members as to the prices they could and should obtain and as to the policies they should follow with reference to sales and production; and the practice of holding association meetings at which a "concensus of opinion" was frequently reached as to the prices that should be obtained, *did not constitute fixation or control of the prices of maple flooring*. If the price comparisons made by this economic defense have any value or probative force for the purpose for which they were used, they certainly indicate that there has been price fixation or control of the commodities used as the basis of comparison rather than that there has been no fixation or control of the prices of maple flooring.

John Knox Arnold, a special agent of the Federal Trade Commission who has been engaged for twelve years in the investigations of industries, usually under Congressional resolutions, testified as a witness for the Government. After analyzing the exhibits to the Gordon and Keehn depositions, Mr. Arnold stated a number of reasons why the conclusions reached by Mr. Keehn and Mr. Gordon can not possibly be proved by the charts and tables introduced by them for that purpose. Some of these reasons as given by Mr. Arnold are as follows:

The Court: Let me ask you this question: From your experience in research work is it not true that unless there is an absolute monopoly and thus an absolute control, will not the general trend of prices of any commodity be in accordance with the law of supply and demand—now I mean by that the trend?

A. The trend will be; yes, sir. (Vol. II, p. 821.)

It must be kept constantly in mind that such charts merely show the direction and rate of the change and not the extent or magnitude of the change.

An attempt has been made by means of various charts, indicated as exhibits in the testimony of Messrs. Gordon and Keehn, to show that other causes than concerted action or control have been responsible for the extent or magnitude of changes that have occurred in the prices, production, and stocks of maple flooring. To do this, it would of

course be necessary to account for one hundred per cent of all changes in prices, production, and stocks as being due to other causes, so as to leave nothing for the control cause to effect; but this has not been done; no such exact quantitative effect is shown by any of the charts; only trends and especially cyclical trends are shown, which is attempted to disprove control by ignoring it; by the same method it could be shown that costs of production have no effect upon prices of maple flooring. Merely omit costs and state that the other factors show the same trend of movement as the prices show, which would probably be true, and it would be proven that cost don't affect prices. (Vol. II, p. 823.)

In connection with what you have just stated, your Honor, I might add this, that in describing these charts and these trends, and so forth, I have not been criticising their use in connection with this so-called cyclical trend, which merely is a guess and something that is necessary, however, in the business, because it is a little better guess than a guess based on nothing. It has not been perfected up to this time, however, to any considerable extent. *What I am basing my remarks on is solely whether these charts and the comment on them prove that there was not control. I do not argue on the other side that the charts prove there was control, because you can not prove that by charts: you can't prove it either way.* (Vol. II, p. 824.)

There is another fact which shows the worthlessness of appellant's expert testimony. As pointed out in appellant's brief (p. 232) there are about 1,800 trade associations in the United States. Nearly every line of industry is dominated by one or more. Much of their activities is no doubt legitimate and much illegitimate when measured by the Government's contentions in this case. That the trend of prices of a very large per cent of the commodities produced in the United States is artificially affected by these associations there can not be the least doubt. Therefore the trend of prices in general can constitute no trustworthy basis for the comparison of prices of any particular commodity.

XII

Discussion of the law

It is believed that no principles of law can be better settled than are those which control the questions involved in this case; and that to refuse to apply them to the facts proven in this record would be in effect to overrule the previous decisions of this court, and to license trade associations to engage in every practice which they may pretend is adopted as a reasonable regulation to promote the general welfare of business, regardless of how it may effect production and prices, and how oppressive it may be upon the public. The cases which have a direct bearing upon the activities of associa-

tions are comparatively few in number, and will now be given more than passing consideration as was done in the former brief filed by the Government.

Eastern States Retail Lumber Dealers' Association v. United States, 234 U. S. 600, may be considered as the leading case in applying the Anti-trust Act to practices of trade associations. The association attacked was composed of retail lumber dealers; and the practice passed upon by the court was that of distributing among the members a list of manufacturers who dealt directly with consumers. The following was the form of the report distributed:

OFFICIAL REPORT

(Name of the particular association circulating it.) Statement to members (with the date)

You are reminded that it is because you are members of our Association and have an interest in common with your fellow members in the information contained in this statement, that they communicate it to you; and that they communicate it to you in strictest confidence and with the understanding that you are to receive it and treat it in the same way.

The following are reported as having solicited, quoted or as having sold direct to the consumers:

(Here follows a list of the names and addresses of various wholesale dealers)

Members upon learning of any instance of persons soliciting, quoting, or selling direct to consumers, should at once report same, and in so doing should, if possible, supply the following information:

The number and initials of car.

The name of consumer to whom the car is consigned.

The initials or name of shipper.

The date of arrival of car.

The place of delivery.

The point of origin.

The facts relative to the preparation and distribution of this list and the inferences to be drawn therefrom are thus stated by the court:

The record discloses a systematic circulation among the members of the defendant associations of the official report above quoted. The method of operation as stated by the learned counsel for the appellants is thus summarized in his brief:

“ The names on this list are obtained and placed thereon as the result of complaints made by individual retailers. When an individual member of a retail association learns of a sale by a wholesaler to one of the customers of the retailer he may complain in writing to the secretary of his association, whose duty it is thereupon to ascertain the facts by correspondence with the wholesaler in question and such other means as may seem proper. Should the report or complaint be without proper foundation or should the secretary become satisfied that

the matter is a trifling one or the result of inadvertence, the incident usually terminates at this point; but should the complaint appear to be serious and well founded the case is submitted to the board of directors of the retail association at its next meeting and should the board be satisfied that the wholesaler is generally making a practice of selling to consumers or customers of the retail trade, the secretary is directed to report the name of such wholesaler for the official list. Thereupon the secretary sends the name to Mr. Crary of New York who adds it upon the next report to the names of those already thereupon. Each report contains the names of all wholesalers who have been reported from the very beginning as selling to consumers and whose names have not been removed for cause. The reports or lists after being printed in New York are distributed amongst the secretaries of the defendant associations; those for each association being marked with its name and in that way only being distinguished from those sent to the other associations. The secretary of each association then distributes the lists to his members. Should any wholesaler desire to have his name removed from the list he can have it done upon satisfactory assurance to the local secretary that he is no longer selling in competition with the retailers. In practice the greatest care is taken to make the list accurate, and as a matter of fact, it only contains the names of such wholesalers

as are absolutely committed to the practice of competing with retailers for the custom of builders and contractors."

The reading of the official report shows that it is intended to give confidential information to the members of the associations of the names of wholesalers reported as soliciting or selling directly to consumers, members upon learning of any such instances being called upon to promptly report the same, supplying detailed information as to the particulars of the transaction. When viewed in the light of the history of these associations and the conflict in which they were engaged to keep the retail trade to themselves and to prevent wholesalers from interfering with what they regarded as their rights in such trade there can be but one purpose in giving the information in this form to the members of the retail associations of the names of all wholesalers who by their attempt to invade the exclusive territory of the retailers, as they regard it, have been guilty of unfair competitive trade. These lists were quite commonly spoken of as blacklists, and when the attention of a retailer was brought to the name of a wholesaler who had acted in this wise it was with the evident purpose that he should know of such conduct and act accordingly. True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do, but he is blind indeed who does not see the purpose in the

predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own. Indeed this purpose is practically conceded in the brief of the learned counsel for the appellants:

“It was and is conceded by defendants and the Court below found that the circulation of this information would have a natural tendency to cause retailers receiving these reports to withhold patronage from listed concerns. That was of course the very object of the defendants in circulating them.”

In other words, the circulation of such information among the hundreds of retailers as to the alleged delinquency of a wholesaler with one of their number had and was intended to have the natural effect of causing such retailers to withhold their patronage from the concern listed. (234 U. S. 607-609.)

In reply to the contention that no agreement between the defendants was proven, the Court said:

But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when in this case by concerted action the names of wholesalers who were

reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred. (p. 612).

The pressure thus brought to bear upon the manufacturer, which induced him to trade through retailers and not directly to the public was not the only restraint deemed material by the court. With reference to the moral effect upon the retailers themselves who received the lists the court said:

The circulation of these reports not only tends to directly restrain the freedom of commerce by preventing the listed dealers from entering into competition with retailers, as was held by the District Court, *but it directly tends to prevent other retailers who have no personal grievance against him and with whom he might trade from so doing, they being deterred solely because of the influence of the report circulated among the members of the associations.* In other words, the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations, who had reported a wrong to himself, which grievance when brought to the attention of others it was hoped would deter them from dealing with the offending party. This practice

takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within the act and puts it within the prohibited class of undue and unreasonable restraints, such as was the particular subject of condemnation in *Loewe v. Lawlor*, *supra*. (pp. 612-613).

In answer to the contention that what was done was for the protection of the retail trade, the court said:

The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. *Addyston Pipe Co. v. United States*, 175 U. S. 211, 241, 242. (p. 613).

The court concluded its opinion thus:

When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual

or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress, and the District Court was right in so holding. (p. 614).

The principles there decided are directly applicable to and in fact control this case, but the practice there condemned was simple and innocuous in comparison with the scheme adopted and enforced by defendants. There the immediate purpose was not the control or increase of prices, though prices were no doubt incidentally affected by the practice. It was not claimed that the general volume of business was reduced. The restraint consisted in diverting the trade from the path which it otherwise would have taken; or rather in forcing it to remain in its usual path. While the distribution of the list was made pursuant to an understanding between the members of the association, yet there was no agreement between them that they would give any consideration to the lists. The restraint resulted entirely from the moral effect the information distributed had upon the members. If one was "blind indeed who does not see the purpose in the predetermined and periodical circulation of this report" as said by the court in that case, he is unquestionably blind if he fails to see the purpose of the distribution by the defendant association of the pretended "average cost" tables, the freight rate books giving the pretended "delivered costs" of

flooring at thousands of points in the United States, the statistics showing every sale by each member and prices received, and the monthly meetings to discuss economic conditions, and all questions pertinent to the industry.

American Column & Lumber Co. v. United States, 257 U. S. 377, was the first case in which an association was attacked because it engaged in what is known as "Open Price Competition." As great effort is made by counsel for appellants to distinguish that case from the present one, the opinion of the court therein will be considered at some length. The opinion may be divided into four parts, to wit:

- (1) A statement of the plan;
- (2) The manner of its enforcement;
- (3) The results of its operation; and
- (4) Application of the law.

Beyond question what the court condemned was *the plan*; and the evidence showing the manner in which it was enforced and the results therefrom was cited and discussed only to show the purpose intended to be accomplished by the association and what was actually accomplished. In interpreting this decision, counsel for many associations, as was done by counsel for the defendant association, have made the mistake of assuming that the case is not an authority unless the identical acts be committed in enforcing the association's plan that were shown to have been committed by the association

attacked in that case; when in fact the precise character of the acts are unimportant, if the plan itself is of such nature that if enforced interstate commerce will be restrained thereby, and if the proof shows that the plan has been adopted and put in operation by the members of the association. An analysis of the opinion will show, not only that no element deemed essential in that case is wanting here, but that there are elements which did not there exist but are present here, that are specially vicious, and are within themselves violative of the antitrust act.

In beginning the discussion the court said:

The activities which we shall see were comprehended within the "Open Competition Plan," (which is sometimes called "The New Competition,") have come to be widely adopted in our country, and, as this is the first time their legality has been before this court for decision, some detail of statement with respect to them is necessary (p. 392).

The court then quotes at some length from the report of the committee which evolved the plan. In that report the committee discussed the objects of the plan and the benefits expected to be derived therefrom; and as defendants in this case are operating the same open price plan that was there attacked and condemned, that report is as pertinent here as if made by a committee of the defendant association. With reference to that report and a sub-

sequent explanation of the objects and purposes of the plan, the court in part said:

After stating that the purpose was not to restrict competition or to control prices but to "furnish information to enable each member to intelligently make prices and to intelligently govern his production," the committee continues:

"The chief concern of the buyer, as we all know, is to see that the price he pays is no higher than that of his competitors, against whom he must sell his product in the market. The chief concern of the seller is to get as much as anybody else for his lumber; in other words to get what is termed the top of the market for the quality he offers. By making prices known to each other they will gradually tend toward a standard *in harmony with market conditions*, a situation advantageous to both buyer and seller."

Not long after the consolidation, a further explanation of the objects and purposes of the "Plan" was made in an appeal to members to join it, in which it is said:

"The theoretical proposition at the basis of the Open Competition plan is that,

"Knowledge regarding prices actually made is all that is necessary to keep prices at reasonably stable and normal levels."

“ The Open Competition plan is a central clearing house for information on prices, trade statistics, and practices. By keeping all members fully and quickly informed of what the others have done, the work of the plan results in *a certain uniformity of trade practice*. There is no agreement to follow the practice of others, *although members do naturally follow their most intelligent competitors*, if they know what these competitors have been actually doing.

“ The monthly meetings held in various sections of the country each month have improved the *human relations* existing between the members before the organization of this plan.” (Italics the court’s p. 392.)

After quoting at length from a subsequent communication sent to the members in which the advantages of the plan were recited, the court then stated in detail the system of reporting, first by members to the association, and second by the association to the members; and without quoting, or giving a summary of the court’s language it is sufficient to say that the system of reports there described and the system used by defendants in this case are in every material feature precisely the same. One association may not have copied the “ plan ” from the other; but if not, they both originated in the same mind and were copied from the same pattern. It is true that in the plan there described provision was made for each member to file at the beginning of each month a price list; but

the proof showed without dispute that this requirement was never observed. *In the operation of the defendant association no such requirement is necessary because the association itself furnishes to all the members a minimum price list or a list of so-called "average costs" of manufacture and distribution.* After a description of the reporting system the court said:

This extensive interchange of reports, supplemented as it was by monthly meetings at which an opportunity was afforded for discussion "of all subjects of interest to the members," very certainly constituted an organization through which agreements, actual or implied, could readily be arrived at and maintained, if the members desired to make them (p. 397).

The court then said that in practice three important additions were made to the plan:

First: Instead of the monthly meetings provided for, the territory in which the association was operating was divided into four districts and forty-nine meetings were held. However the proof showed that the division was for the convenience of the members; and the members really attended a meeting but once a month.

Second: Before each meeting a questionnaire was sent out asking for reports on production for the preceding month and estimated production for the next two months, and whether it was expected that the mill would be shut down, and if so for

how long; and also for the members' views as to market conditions. From the information thus received the statistician compiled a report which was distributed among the members attending the meeting.

The evidence heretofore cited shows that before each meeting the secretary of the defendant association either sends out his monthly report showing all facts from which market conditions can be judged, or distributes it among the members at the meeting. This report is based on the reports from the several members which contain all the information asked for in the questionnaire that was sent out by the statistician of the Hardwood Association. The only feature not present here was the request for an expression of opinion in writing by each member as to market conditions. But the members had all the data before them and fully discussed market conditions in the meetings. *Although there was no attempt made to keep full minutes of the discussions, yet it appears that in the eight meetings held in 1922 after the adoption of the present articles of association, "Stock Conditions" and flooring data were discussed in them all, and "Trade conditions and relations of supply and demand as reflected by statistical reports" were discussed in seven.* What then could have been the value of an expression of opinion on paper when the members freely and fully, and doubtless with much emphasis, expressed their views in meetings?

Third: While the plan provided for a monthly market letter, Gadd, the manager of statistics, actually sent out letters of that nature with the weekly sales reports; and it is upon comments made in those letters that chief reliance is had for distinguishing that case from the present one. In fact, after the defendant association had suspended its reporting system because of the decision in the Hardwood case, it was advised by counsel that the practice could safely be resumed if the reports were not accompanied by comments. *But when that was done, the members of the association began to hold meetings monthly, the object manifestly being that they might more frequently exchange their own views and receive the views of their expert statistician in regard to market conditions.*

After stating in detail the plan as adopted with the features added in practice the court said:

Obviously the organization of the defendants constitutes a combination and confessedly they are engaged in a large way in the transportation and sale of lumber in interstate commerce so that there remains for decision only the question whether the system of doing business adopted resulted in that direct and undue restraint of interstate commerce which is condemned by this Antitrust statute.

It has been repeatedly held by this court that the purpose of the statute is to maintain free competition in interstate commerce

and that any concerted action by any combination of men or corporations to cause, or which in fact does cause, direct and undue restraint of competition in such commerce falls within the condemnation of the act and is unlawful (pp. 399-400).

The court then, after quoting from a number of authorities in which the Antitrust Act had been construed, quotes at length from communications sent by Gadd to the members and also from letters written by members to Gadd in response to a circular letter sent out by him asking for an expression of opinion as to benefits received from the operation of the plan. And these quotations are followed with the remark:

These quotations are sufficient to show beyond discussion that the purpose of the organization and especially of the frequent meetings was to bring about a concerted effort to raise prices regardless of cost or merit, and so was unlawful, and that the members were soon entirely satisfied that the "Plan" was "carrying out the purpose for which it was intended" (p. 409).

Therefore the comments of Gadd and the statements of the members as to benefits derived from the plan was deemed important *because they showed the purpose of the organization*. And there is no justification whatever for the assumption that the identical evidence then introduced must appear in this record before that case can be considered a controlling authority in this one. As

above shown the members of the defendant association meet and discuss face to face the very questions discussed by Gadd in his market letters and they have present with them Secretary Keehn, with whom in astuteness Gadd can not be compared. There is no probability that the Government ever will be able to introduce in another case the same evidence with reference to the results accomplished by the association, because no other manager will ever write the members asking testimonials as to its benefits. But incidentally the same character of evidence appears in the letter from the North Branch Flooring Company to the Flanner Steger Land & Lumber Company dated February 5, 1923, in which it was said:

We can say from actual experience that the personal contact and association with the other members has become very valuable to us *and we have been able to capitalize this to a remarkable degree.* (Vol. IV, p. 479.)

And in the reply it was said:

We are quite in accord with what you have to say regarding the value of attending the Flooring Association meetings. (Vol. IV, p. 480.)

After a thorough review of the facts and the law the court said:

To call the activities of the defendants, as they are proved in this record, an "Open Competition Plan" of action is plainly a misleading misnomer.

Genuine competitors do not make daily, weekly, and monthly reports of the minutest

details of their business to their rivals, as the defendants did; they do not contract, as was done here, to submit their books to the discretionary audit and their stocks to the discretionary inspection of their rivals for the purpose of successfully competing with them; and they do not submit the details of their business to the analysis of an expert, jointly employed, and obtain from him a "harmonized" estimate of the market as it is and as, in his specially and confidentially informed judgment, it promises to be. This is not the conduct of competitors but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that, if it did not stand confessed a combination to restrict production and increase prices in interstate commerce and as, therefore, a direct restraint upon that commerce, as we have seen that it is, that conclusion must inevitably have been inferred from the facts which were proved. *To pronounce such abnormal conduct on the part of 365 natural competitors, controlling one-third of the trade of the country in an article of prime necessity, a "new form of competition" and not an old form of combination in restraint of trade, as it so plainly is, would be for this court to confess itself blinded by words and forms to realities which men in general very plainly see and understand and condemn, as an old evil in a new dress and with a new name.*

The " Plan " is, essentially, simply an expansion of the gentlemen's agreement of former days, skillfully devised to evade the law. To call it open competition because the meetings were nominally open to the public, or because some voluminous reports were transmitted to the Department of Justice, or because no specific agreement to restrict trade or fix prices is proved, can not conceal the fact that the fundamental purpose of the " Plan " was to procure " harmonious " individual action among a large number of naturally competing dealers with respect to the volume of production and prices, without having any specific agreement with respect to them, and to rely for maintenance of concerted action in both respects, not upon fines and forfeitures as in earlier days, *but upon what experience has shown to be the more potent and dependable restraints, of business honor and social penalties—cautiously reinforced by many and elaborate reports, which would promptly expose to his associates any disposition in any member to deviate from the tacit understanding that all were to act together under the subtle direction of a single interpreter of their common purposes, as evidenced in the minute reports of what they had done and in their expressed purposes as to what they intended to do* (257 U. S. pp. 410-411).

We have endeavored to show that there was not an essential element in that case which is not present in this one. But, there are very important fea-

tures in the present case which did not exist in the Harwood case. *That case involved solely the open price plan. Here, while the open price plan is being operated in all of its vigor, there is added to it the estimation and distribution of so-called average cost prices of manufacture and distribution, which is nothing less than minimum price lists, and also the distribution of freight rate books showing the minimum prices at thousands of points in the United States so as to make easy the observance of these minimum prices. In short there is here presented a minimum price fixing system perfectly adjusted and effectively enforced by the exchange of information through the association.*

United States v. American Linseed Oil Company, 262 U. S. 371, involved the validity of an organization which functioned through a bureau. The manufacturers of linseed oil made separate but identical contracts with the bureau whereby they obligated themselves to furnish reports of their sales and prices to the bureau; and the bureau was to report the information to the other members. Monthly meetings were also provided for. The plan was operated through Mr. Armstrong, who called himself a bureau, instead of through an association conducted by a secretary as in the present case, or a manager as in the Harwood case. Naturally there is a variation in the plan as applied to different industries. The production of linseed oil is seasonal; and it is sold generally for future delivery months in advance.

For the plan to work successfully in connection with that industry it was felt necessary that change of prices should be promptly reported. Every member was at perfect liberty, so the defendants all claimed, to change its price at any time and to any extent it might see fit; but if it offered oil to a prospective purchaser for less than its list price it immediately wired its offer to the bureau, which relayed it to the members. When it was suspected that a member had made a sale for less than its list price other members had the right to make inquiry of such member about the matter through the bureau. The evidence showed that the system as outlined in the contract was pretty rigidly enforced. The court after stating at length the provisions of the contracts and the manner in which they had been enforced said:

The Sherman Act was intended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain. “The statute did not forbid or restrain the power to make normal and useful contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose.
* * * The words restraint of trade should be given a meaning which would

not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect.” *United States v. American Tobacco Co.*, 221 U. S. 106, 179, 180; *Ramsay Co. v. Associated Bill Posters*, 260 U. S. 501; *Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463.

Certain it is that the defendants are associated in a new form of combination and are resorting to methods which are not normal. If, looking at the entire contract by which they are bound together, in the light of what has been done under it the Court can see that its necessary tendency is to suppress competition in trade between the States, the combination must be declared unlawful. That such is its tendency, we think, must be affirmed. To decide otherwise would be wholly inconsistent with the conclusion reached in American Column & Lumber Co. v. United States, supra. (pp. 388–389).

And the court thus concluded its opinion:

We are not called upon to say just when or how far competitors may reveal to each other the details of their affairs. In the absence of a purpose to monopolize or the compulsion that results from contract or agreement, the individual certainly may exercise great freedom; but concerted action through combination presents a wholly different problem and is forbidden when the

necessary tendency is to destroy the kind of competition to which the public has long looked for protection. The situation here questioned is wholly unlike an exchange where dealers assemble and buy and sell openly; and the ordinary practice of reporting statistics to collectors stops far short of the practice which defendants adopted. Their manifest purpose was to defeat the Sherman Act without subjecting themselves to its penalties.

The challenged plan is unlawful and an injunction should go against it as prayed by the original bill (p. 390).

In fact, as pointed out by the court in the *Hardwood and Linseed Oil Cases*, combinations in the form of associations engaging in practices of the nature heretofore described fall squarely within the prohibitions of the Antitrust Act as construed in many former cases.

While as said in *United States v. American Tobacco Co.*, 221 U. S. 106, 179, in referring to the previous decision in the *Standard Oil case*, "the statute did not forbid nor restrain the power to make *normal and usual contracts* to further trade by resorting to all *normal* methods, whether by agreement or otherwise to accomplish such purpose," yet as declared in the same case (p. 181), "in view of the general language of the statute and the public policy which it manifested, *there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form,*

since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute."

It is presumed that if the evidence showed that the members of the defendant association had entered into a positive agreement either written or verbal to observe as minimum selling prices a specified list giving the prices of the different kinds, grades and dimensions of flooring, there would be no disagreement that such a combination is unlawful. There can be no distinction in principle between agreeing upon a fixed uniform price and upon a fixed minimum price. The latter is in fact more vicious than the former because it not only destroys all competition below the agreed price, *but at the same time encourages competitors to press the prices upward.* If the observance of definite prices had been agreed upon by defendants and the agreement had been observed, there would have been no advancement of prices every time the high prices indicated that the market would stand an advance of the minimum, because there would have been no testing of the market for higher prices. That is, on October 25, 1922, the price of 15/16" x 2 1/4" clear maple flooring would not have been advanced from \$90 to \$95 per M, and on February 3, 1923, to \$100, and on March 10 to \$105; but the price would have continued at \$90. If then it is unlawful to positively agree upon minimum prices, although no provision is made to enforce the agree-

ment, how can the plan adopted and now operated by defendants possibly escape condemnation? The old "gentlemen's agreement," which has been so often condemned by this court, was never very effective because of the disposition of the parties not to observe it. Some of the witnesses testify in this case that in years past prices of flooring were agreed upon, but the result was unsatisfactory. Literally this plan, as said by the court in the *Hardwood* case "is, essentially, simply an expansion of the gentlemen's agreement of former days, skillfully devised to evade the law." While it is impossible to prove a *positive* agreement written or verbal between the defendants that they would observe specified minimum prices, yet a system has been devised by which by moral coercion and "the inherent disposition to make all the money possible" *a practical observance of specified prices as a minimum has been actually accomplished*. And not only that, but through absolute freedom and an incentive to oversell those prices, they are steadily forced upward. Is it possible that the Antitrust Act is effective against a positive agreement which is not legally binding, and which can not be, and in fact is not successfully enforced, and at the same time is without virtue in the presence of a combination which effectually fixes minimum prices and compels an increase of prices? Is it the form and not the substance at which the Antitrust Act is directed? Such a

thought was of course expressly repudiated in the Hardwood and Linseed Oil cases. And if the system of exchanging information and holding meetings condemned in the Linseed Oil case was "a new form of combination," and a "resorting to methods which are not normal," and the scheme of reporting sales and prices, the advising of reduction in production of lumber and stability or increase of prices, and holding of monthly meetings proven in the Hardwood case was "simply an expansion of the gentlemen's agreement of former days," what can be said in defense of the plan or scheme devised and enforced by defendants? Here, when the bill was filed, not only were defendants exchanging information which laid bare to each other the minutest details as to stocks on hand, production, shipments, and quantities of flooring sold and prices at which sold, not only were they holding monthly meetings in which market conditions and every phase of the industry were fully discussed with admissions of members that views were at times interchanged, generally privately, on the floor or at their luncheons about the prohibited subject of prices, *but they also compute and distribute among the members what they claim to be "AVERAGE costs" of production and distribution, not the cost of any one member but claimed to be the AVERAGE of all, but really as heretofore demonstrated, not COST prices at all, but prices adjusted to meet market conditions; and these prices were*

accompanied with a freight rate book which gave the DELIVERED prices at thousands of points in the United States and instructions how such prices could be easily computed for all other points. Is that the USUAL and NORMAL way in which real competitors conduct their business? When the Anti-trust Law was enacted did Congress have in mind such a scheme or device as a USUAL and NORMAL method for those engaged in the same industry to compete with each other?

Why this distributing among the members of "average cost" prices? Why this sending out freight rate books showing the exact delivered prices at thousands of points? Why this weekly exchange of information as to sales and the exact prices received? Why these monthly meetings to discuss among each other production, market conditions and all other questions affecting the industry? Blind indeed is he who can understand that these practices were engaged in for any other purpose than to maintain minimum prices that would give the member most unfavorably situated some, and many members an exorbitant, profit; and at the same time to steadily and certainly increase prices. And who can believe that they did not accomplish such purpose? It is inconceivable that maple, birch, and beech flooring would have sold since March, 1922, at the same prices at which they have been sold had no such organization as the defendant associa-

tion existed, had each member of the association conducted his own business independent of such influences and in the way it was understood when the Antitrust Act was passed the business of genuine competitors is conducted. The closing remarks of Circuit Judge (subsequently Mr. Justice) Lurton in the great opinion delivered in *John D. Park & Sons Co. v. Hartman*, 153 Fed. 24, 46, is specially applicable in this case:

It has been suggested that we should have regard to new commercial conditions and a tendency toward a relaxation of old common-law principles which tend to prevent development on modern lines. This is an argument better addressed to legislative bodies than to the courts. Neither is it wise for the courts to countenance the introduction of artificial distinctions dependent upon the variant economic views of individual judges. Distinctions which are specious or analogies which are but apparent will but afford opportunities to whittle away broad economic principles lying at the bottom of our public policy, principles which have long received the sanction of statesmen and the approving recognition of a long line of jurists. A like argument is expected whenever some new method of circumventing freedom of commerce comes under the tests of the law. It was made and answered by Judge Taft in the Addyston Pipe Case with a strength to which we can add nothing.

The relief to which the Government is entitled

Defendants appear to insist that the association has the right to do certain things, as, for instance, to standardize maple flooring and maintain inspectors; and therefore that the court should specify what particular things the association can do, and so limit the injunction as to exclude such activities from its provisions. *But to comply with such contention would be for the court to undertake to construct an association for the defendants which according to the court's view would be a legitimate one.* This the court will not do, because it never can be determined in advance what the effect of a particular organization will be; and the court might authorize the formation of an association to exercise certain functions which in actual operation would result in the most serious restraint of interstate commerce. Certainly parties who have openly violated the law by creating and engaging in an unlawful combination can not invoke the agency of the court to create for them a different combination which the court might consider legitimate.

The situation here presented is quite different from the conditions existing when the acquisition of various properties by a corporation, or the merger of a number of corporations into one, have been held to constitute a monopoly or an unlawful combination in violation of the Anti-Trust Act. There the rights of property are involved, and the

court will not destroy the property, but direct that it be restored to the original owners, or be so divided that a further violation of the statute will not exist. But here no property rights are involved. There exists nothing but an agreement or combination which the defendants have entered into and in which they are engaging; and the status quo is restored and the restraints upon commerce are stopped by a simple decree declaring the agreement and combination unlawful, and inhibiting the defendants from further engaging therein, or in any combination of like character.

An unlawful conspiracy may be composed of elements each of which when considered alone is lawful. As said in *Swift v. United States*, 196 U. S. 375, 396:

The scheme *as a whole* seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges they are alleged sufficiently as elements of the scheme. *It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful.*

Defendants' contention leads to the absurd result that where each element of a conspiracy is

when standing alone lawful no injunctive decree can be entered, although the conspiracy composed of these several elements may be unlawful and accomplish the most harmful results.

This question was conclusively settled in *American Column & Lumber Co. v. United States*, *supra*. There the court entered a sweeping decree declaring the association an unlawful combination and inhibiting the defendants from engaging in any of the activities provided for by its organization. On the hearing defendants' counsel earnestly insisted that the decree was too broad and that the court should specify certain things which the association could legitimately do. The court disregarded this insistence and affirmed the decree of the court below *intoto*. A petition for a rehearing was filed, in which it was again urged upon the court that a limitation should be placed upon the decree and that the defendants should not be enjoined from separately doing a number of things prescribed by the association, but the petition was dismissed by the court.

In fact the question had been settled in the case of *Swift v. United States*, 196 U. S. 375, 401-2. A broad decree inhibiting the defendants from engaging in any of the things alleged in the bill had been entered by the court below, and it was insisted that the decree should be modified in certain particulars. The only modification directed by the court was that in one or two particulars it should be made more specific. But the court especially considered

the allegations in the bill (the case had been disposed of on demurrer) wherein it was alleged that defendants had engaged in and would continue arrangements with the railroads whereby the defendants received, by means of rebates and other devices, rates less than the lawful rates for transportation, and were exclusively to enjoy and share this unlawful advantage to the exclusion of competition and the public (p. 392). The court stated that the acts here charged, apart from the combination and the intent, might perhaps not necessarily be unlawful except for the adjective which proclaimed them so, and the court assumed for the purpose of the decision that they were not unlawful, and that the defendants severally might lawfully obtain less than the regular rates for transportation if the circumstances were not substantially similar to those for which the regular rates were fixed; but the Court said:

Whether this particular combination can be enjoined, as it is, apart from its connection with the other elements, if entered into with the intent to monopolize, as alleged, is a more delicate question. The question is how it would stand if the tenth section were the whole bill. Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law. *Commonwealth v. Peaslee*, 177 Massachu-

setts, 267, 272. The same distinction is recognized in cases like the present. *United States v. E. C. Knight Co.*, 156 U. S. 1, 13; *Kidd v. Pearson*, 128 U. S. 1, 23, 24. We are of opinion, however, that such a combination is within the meaning of the statute. It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation. And even if the advantage is one which the act of 1887 permits, which is denied, perhaps inadequately, by the adjective "unlawful," still a combination to use it for the purpose prohibited by the act of 1890 justifies the adjective and takes the permission away. (196 U. S. 401, 402).

For the foregoing reasons the decree of the court below should be in all things affirmed.

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